92-647

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1992

TAFFET,

Petitioners,

v.

THE SOUTHERN CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

A public electric utility and its outside accountant, *in violation of RICO,* 18 U.S.C. §§ 1961-68, submitted false expense accounts for spare parts to the Federal Energy Regulatory Commission ("FERC") and the Alabama and Georgia Public Service Commissions. As a result of the successful fraud upon FERC and the Commissions, the utility obtained rate increases inflated by the false expense accounts which the utility then charged its Ratepayers.

1. Does the filed rate doctrine apply in the face of successful, active, concealed fraud upon FERC and state Public Service Commissions to bar the Ratepayers' otherwise valid cause of action under RICO to recover their money paid to the utility as a result of the fraud?

2. Does a consumer who pays the fraudulently inflated rate charged by the utility suffer an "injury to business or property" under RICO 18 U.S.C. § 1964(c)?

3. Are causes of action under the Sherman Antitrust Act, 42 U.S.C. § 1983, and other federal statutes also barred by the filed rate doctrine?

Must a RICO plaintiff show that a defendant is criminally liable under 18 U.S.C. § 1962 to recover under RICO?

PARTIES

This case seeks review of two cases consolidated on Appeal to the Eleventh Circuit:

Case No. 90-7088
Appeal from the United States District Court, Middle District of Alabama: D.C. Docket No. 89-V-712-N.

M.R. Taffet and Robert M. Fierman, on behalf of themselves and all of the persons, corporations, municipalities and other entities, other than the defendants, who are similarly situated,

Plaintiff-Appellants,

v.

The Southern Co., Southern Company Services, Inc., Alabama Power Company and Arthur Andersen & Co.,

Defendant-Appellees.

Case No. 90-8452
Appeal from the United States District Court for the Southern District of Georgia

Frederick Rodgers Carr, Carr Sales Company, O.E.M. Products, Inc., Timothy Dunn Stokely, Clark Stokely, III, and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

The Southern Company, Southern Company Services, Inc., Georgia Power Company and Arthur Andersen & Co.,

Dedendant-Appellees.

There are no other parties. There are no parent or non-wholly owned subsidiaries of any Appellant corporation.

Petitioners are not aware of any parent corporation or non-wholly owned subsidiary of any Respondent.

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1. *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992)

2. *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *vacated*, 958 F.2d 1514 (1992)

3. *Carr v. Southern Co.*, 731 F. Supp. 1067 (S.D. Ga. 1990)

4. *Taffett v. Southern Co.*, No. 89V-712N, 1990 U.S. DIST. LEXIS 4189 (M.D. Ala. Jan. 5, 1990)

STATEMENT OF JURISDICTION

1. Judgment entered July, 24, 1992

2. Jurisdiction to review the judgment below by writ of certiorari is conferred on the court by 28 U.C.C. §1254

CONSTITUTIONAL PROVISIONS AND STATUTES

1. RICO: 18 U.S.C. § 1964(c) (1988): Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

2. U.S. Const., art. VI, cl. 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Sherman Antitrust Act, Clayton Act: 15 U.S.C. § 15 (1988): [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

4. Civil action for deprivation of rights: 42 U.S.C. § 1983 (1988): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS

A. *Statement of Facts*

This petition for writ of certiorari is filed on behalf of the plaintiffs ("Ratepayers") in two cases consolidated on appeal, *Taffet v. Southern Co.*, No. 89V-712N, 1990 U.S. DIST. LEXIS 4189, (M.D. Ala. January 5, 1990) ("Alabama case") and *Carr v. Southern Co.*, 731 F. Supp. 1067 (S.D. Ga. 1990) ("Georgia case").

The Ratepayers[1] in the Georgia case sued the Southern Company, Southern Company Services, Inc., Georgia Power Company and their accountants, Arthur Andersen & Co., ("Arthur

[1]No class has been certified.

Andersen''). The Ratepayers in the Alabama case sued the Southern Company, the Southern Company Services, Inc., Alabama Power Company and their accountants, Arthur Andersen (hereinafter all utility defendants collectively referred to as the ''Power Company''). The complaints allege that the Power Company, in conspiracy with Arthur Andersen, its independent accounting firm, understated its net income in rate applications to the state public service commissions and to FERC by submitting false expense accounts for purchases of spare parts which inflated the rate increase granted. Thus, the utilities fraudulently obtained rate increases. The Ratepayers seek recovery of their money paid to the utilities as a result of the fraudulently obtained rate increases.

The Power Company each year spends millions of dollars for emergency and maintenance spare parts for its plants and equipment. Historically, the Power Company expensed the cost of these spare parts in the year purchased whether or not these spare parts were used in the year purchased. The applicable standards of accounting set by the Internal Revenue Service, FERC, the public service commissions, and as interpreted from time to time by the National Association of Regulatory Utility Commissioners, require that the cost of maintenance spare parts be expensed in the year the spare part is used rather than the year purchased. The same accounting standards require that the cost of emergency spare parts be capitalized and depreciated over the life of the plant rather than expensed in the year purchased. Proper accounting decreases expenses. As a result of this wrongful accounting, the Power Company submitted false and inflated expenses for spare parts to the public service commissions and to FERC and successfully obtained substantial rate increases inflated by the false expensing of spare parts. Increased expenses resulted in reduced income after expenses which resulted in increased rates to cover the falsely inflated expenses.

In 1982, the Power Company, after "discovering" the wrongful accounting method, filed with the IRS a request to change to proper accounting methods for spare parts and executed an agreement to pay the past taxes due because of the correction. However, the Power Company only declared to the IRS some $36 million of spare parts wrongfully accounted for although it had in inventory at least $60 million of spare parts which had previously been expensed but had not yet been used. In fact, an internal memo of the Georgia Power Company, dated January 31, 1986, showed that the Georgia Power Company had on hand $117,903,014.58 worth of spare parts which had already been expensed and charged to the Ratepayers but had not been used.

From 1981 to 1988 the Power Company did not report the wrongful accounting methods to the public service commissions or FERC and did not seek to correct the accounting for those spare parts on hand which had been previously wrongfully expensed. Furthermore, the Power Company, with full knowledge of its wrongful accounting method, continued to submit applications for and to obtain rate increases which included reimbursement for wrongfully expensed spare parts.

To keep track of the wrongfully expensed spare parts still on hand, the Power Company devised an "off-the-books" accounting system to track these spare parts until they could surreptitiously dispose of them without discovery of their existence by the IRS, the public service commissions or FERC.

Partners in Arthur Andersen had knowledge of and participated in the scheme of the Power Company. Arthur Andersen personnel read the memoranda concerning the off-the-books accounting scheme and knew of the improper expensing of spare parts. Arthur Andersen certified the audits of the books and records of the Power Company containing the false expense figures, signed corporate tax returns which falsely started the amount of

expenses, and participated in repeated meetings to discuss the continuing scheme to cover up the wrongful expensing of spare parts from the IRS, FERC and the public service commissions.[2]

The Alabama ratepayers alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. §§ 1961-68) and common law fraud under state law. The Georgia Ratepayers additionally alleged, *inter alia*, violations of the Sherman Antitrust Act (15 U.S.C. §§ 1, 2 (1988)), 42 U.S.C. § 1983, the Public Utilities Holding Company Act of 1935 (15 U.S.C. § 79 (1988)), the Georgia RICO Act (O.C.G.A. § 16-14-1 (1992)) and common law fraud.

Jurisdiction is based on: 18 U.S.C. § 1964 (1988); 15 U.S.C. §15 (1988); 42 U.S.C.§ 1983 (1988); 28 U.S.C. §§ 1331, 1337 (1988); 15 U.S.C. § 79; 16 U.S.C. §§ 825p, 2633 (1988).

B. *Course of Proceedings*

Both the Alabama and Georgia courts granted Defendants' Federal Rules of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim on the grounds that the clear statement doctrine, abstention, the primary jurisdiction doctrine and the filed rate doctrine barred the complaint.

In May 1991, the Eleventh Circuit panel reversed, holding, *inter alia*, that the filed rate doctrine was not a bar to the complaint where there has been fraud upon the agency. *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991). In April 1992, the Eleventh Circuit vacated the panel opinion. *Taffet v. Southern Co.*, 958 F.2d 1514 (11th Cir. 1992). On July 24, 1992 the Eleventh Circuit, sitting en banc, affirmed the decisions of the district courts on the basis that the filed rate doctrine barred

[2]This fraudulent scheme came to light in 1988 when an accountant for the Power Company went "undercover" for the IRS and taped Power Company meetings at which the fraudulent scheme was discussed and furthered by Power Company executives.

the complaint even in the face of fraud upon FERC and the state public service commissions. *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992).

> The appellants contend also that the filed rate doctrine should not apply where a regulated entity allegedly has defrauded an administrative agency to obtain approval of a filed rate. Again, we disagree.

Id. at 1494.

Thus, the issue is joined: Is the filed rate doctrine a bar to an otherwise valid RICO claim even in the face of fraud upon an agency?[3] In other words, is the restraining arm of the filed rate doctrine so long that the courts must sanction fraud upon a Federal and/or state agency in deference to the doctrine?

ARGUMENT

The Power Company, by subverting the agency process through the submission of false accounts to FERC and the Public Service Commissions, defrauded the Ratepayers out of their money by charging them rates which included payment for fraudulent expenses. By extending the filed rate doctrine to protect the Power Company from the reach of RICO, the Eleventh Circuit (a) answered a question which has divided five circuit courts and which this Court has identified in previous cases as an important question to be faced in the future by this Court; (b) held that the filed rate doctrine protects fraud upon an agency although historically this Court has rejected every rationale which would protect an agency decision infected with fraud from

[3]Although its en banc opinion focuses on this issue, by affirming the district courts, the Eleventh Circuit applied the filed rate doctrine to bar Sherman Antitrust Claims, a 42 U.S.C. § 1983 claim, and claims alleging violations of other federal statutes.

federal judical scrutiny; (c) placed a new limitation on the application of RICO even though this Court has rejected previous attempts to limit the breadth of RICO, *and* even though Congress has expressly stated that it intended for RICO and to apply to subversion of the agency process; (d) held that a state legislature, by the creation of state agencies, can place limits on the application of RICO that Congress did not intend in violation of the Supremacy Clause of the Constitution of the United States; and (e) gratuitously changed the standard of proof of a predicate act in a civil RICO action to criminally liable from the preponderance of the evidence standard recognized in the decisions of other circuit courts.

In rendering its decision, the Eleventh Circuit has pilloried the integrity of the agency process on both the state and federal level. Regardless of what federal law may be violated in the process, regulated industries are now free to obtain their ends from a regulating agency through whatever fraudulent means the regulated industry can concoct (as long as the agency does not catch them in the act).[4],[5] This decision impales for public mockery the principle previously recognized by all courts that the success of the agency system is dependent upon the honesty of the regulated industry. What legitimate application of the filed rate doctrine, what compellingly important public interest, what discernible congressional intention found in the annals of RICO, or what opinion of this Court suggests that the Power Company should be protected from civil accountability for its dishonest, fraudulent

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[4]Neither FERC nor the Public Service Commissions can retroactively change a rate or grant reparations to the defrauded ratepayers. *Taffet*, 930 F.2d at 853.

[5]The Ratepayers in the Georgia case have alleged violation of 42 U.S.C. §1983, deprivation of property under color of state law. Ironically, the gravaman of this count is action taken under color of state law. The Power Company, through fraudulent manipulation of the agency process ("color of state law"), deprived the Ratepayers of their property. Yet the filed rate doctrine would protect the "color of state law" conduct in this case.

and secret corruption of the regulatory decision making process to obtain an inflated rate? There is none. Any opinion of a court which holds that there is such a protection, not only raises a critical question to be settled by this Court and conflicts with applicable decisions of this Court and other circuits, but so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. (S. Ct. R. 10.)

I. *CONFLICT AMONG CIRCUITS/DEVELOPMENT OF THE ISSUE*

The "filed rate doctrine," first enunciated as such in *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), precludes a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory agency. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Maislin Indus., U.S., Inc. v. Primary Steel Inc.*, 110 S. Ct. 2759 (1990). The purpose of the doctrine is (1) to preserve the regulating agency's authority to determine the reasonableness of rates and (2) to insure that the regulated entities charge only those rates which the agency has approved or of which the agency has been made aware. *Arkansas*, 453 U.S. at 577-78. The uniformity of rates engendered by the doctrine prevents the regulated entities from discriminating among customers and stabilizes rates. *Maislin*, 110 S. Ct. at 2766. In accordance with this uniformity rationale, courts are barred from imposing a rate different from the rate filed with the regulatory agency; the agency, moreover, cannot alter a rate retroactively. Thus, courts do not generally have the right to entertain cases the resolution of which requires a review of the reasonableness of a rate set by a regulating agency. *Taffet*, 930 F.2d at 852-53.

However, the Supreme Court has never applied the filed rate doctrine when faced with a claim that a fraud has been committed upon the regulating agency itself. *Arkansas*, 453 U.S. at 583

n. 13 ("We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct."); *see also Taffet*, 930 F.2d at 856.

Furthermore, Congress has passed RICO creating a civil remedy for persons injured in their business or property by racketeering activity, a statute to be interpreted very broadly. *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 497-98 (1985). And, Congress has specifically stated that RICO applies to subversion of the agency process. S. REP. No. 459, 100th Cong., 2d Sess. 5-6.[6] Thus the stage has been set for RICO and the filed rate doctrine to collide.

Four district courts have wrestled with the outcome of this collision. *Taffet*, No. 89V-712N, 1990 U.S. DIST. LEXIS 4189 (M.D. Ala. Jan. 5, 1990); *Carr*, 731 F. Supp. 1067; *H.J. Inc. v. Northwestern Bell Tel. Co.*, 734 F. Supp. 879 (D. Minn. 1990), on remand from 109 S. Ct. 2893 (1989); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387 (E.D.N.Y. 1989). In *H.J., Inc.* the ratepayers of the telephone company alleged a RICO violation arising out of bribery of public service commissioners resulting in increased rates. In *County of Suffolk*, the ratepayers alleged a violation of RICO arising out of the submission of false information to the public service commission resulting in increased rates. Each district court rejected the RICO claim based on the clear statement doctrine, abstention, the primary jurisdiction doctrine, and the filed rate doctrine.

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[6]In 1988, Congress considered an amendment to RICO creating an affirmative defense for cases brought under §1964(c) for regulated industries acting in good faith reliance on agency action. The Senate stated "[A]ction by [an agency] may satisfy the requirements of the affirmative defense only if the agency's action was official, bona fide and not the result of infiltration or subversion of the regulatory process." The amendment was not passed. *Id.* at 6.

The Second Circuit was the first to address the issue of whether civil RICO claims are barred by these doctrines.[7] *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990). In reversing the trial court, the Second Circuit rejected the various doctrines, but was silent as to the filed rate doctrine. The Second Circuit, acknowledging the district court opinions to the contrary in *Carr* and *H.J.*, and recognizing that while "[t]he issue of the applicability of RICO against a state-regulated public utility in the context of a claim of fraud in the rate-making process poses a difficult question," stated "[W]e disagree with the district court, and hold that public utilities, such as LILCO, are subject to the strictures of RICO." *Id.* at 1305.

Next, the Eleventh Circuit panel reversed *Carr* and *Taffet*. *Taffet v. Southern Co.*, 930 F.2d 847 (11th Cir. 1991), *vacated*, 958 F.2d 1514 (1992). The Eleventh Circuit, citing the Second Circuit, rejected all of the doctrines, including the filed rate doctrine, holding that the filed rate doctrine did not bar a claim arising out of fraud upon the regulating agency by the regulated utility. *Id.* at 856.

Next, the Eighth Circuit affirmed its district court, *H.J., Inc. v. Northwestern Bell Telephone Company*, 954 F.2d 485 (8th Cir.). *cert. denied*, 112 S. Ct. 2306 (1992), holding that the filed rate doctrine barred the plaintiffs' RICO claim even in the face of fraud upon the agency, distinguishing the *Taffet* and *County of Suffolk* circuit decisions on their facts. *Id.* at 496.

Thereafter, the Eleventh Circuit vacated its panel opinion and, citing the Eighth Circuit for authority, entered the present en banc opinion holding that the filed rate doctrine barred

[7]The D.C. Circuit, in dicta, had recognized an exception to the filed rate doctrine in cases of fraudulent conduct. *Southern Union Company v. Federal Energy Regulatory Commission*, 857 F.2d 812, 818 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 1118 (1990).

a RICO complaint arising out of fraud on the agency process. *Taffet v. Southern Co.*, 967 F.2d 1483, 1494-1495 (1992).

Two other circuits have refused to apply the filed rate doctrine in the face of fraud upon the agency in the context of causes of action brought under the Sherman Antitrust Act.[8] In *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982), Clifford provided the ICC with fraudulent information in the connection with rate protests. The Ninth Circuit held:

> In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

Id. at 1271.

The court then rejected the filed rate doctrine as a bar to the plaintiff's claim. *Id.* at 1275-1276. In *Woods Exploration & Producing Co. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971), the district court, relying on the filed rate doctrine, had rejected an antitrust claim against a defendant who submitted false information to the Texas Railroad Commission to obtain favorable production allowables in a gas field. *Id.* at 1294. On appeal, the Fifth Circuit reversed the lower court and rejected the filed rate doctrine, holding:

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[8]In *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992), the Supreme Court held that the meaning of § 1964(c) of RICO is the same meaning given by courts to those same words in § 7 of the Sherman Act and §4 of the Clayton Act. Thus these cases are in conflict with *Taffet*. Furthermore, the Ratepayers in the Georgia case have alleged violations of the Sherman Antitrust Act. Because *Taffet* applies the filed rate doctrine to bar these antitrust claims, *Taffet* is in conflict with these decisions.

> Therefore, while we cannot hold that actions taken pursuant to Commission regulations violate the antitrust laws, we can hold that actions taken to subvert the Commission scheme for anti-competitive purposes are subject to antitrust strictures.

Id. at 1303.

In 1989, the Supreme Court recognized a cause of action under RICO arising out of fraud on the public service commission, *H.J., Inc. v.Northwestern Bell Co.*, 109 S. Ct. 2893 (1989), but specifically noted that it voiced no opinion on the applicability of the filed rate doctrine. *Id.* at 2898 n. 1.

Thus, the Eleventh Circuit and the Eighth Circuit have held that the filed rate doctrine bars claims even in the face of fraud on an agency. The Second, Fifth, and Ninth Circuits, (and *D.C. Circuit,* in dicta) have held that the filed rate doctrine is not a bar to a claim resulting from fraud upon an agency. The Second Circuit and the Supreme Court have recognized that a cause of action may be stated under RICO arising out of fraud on a public service commission, but the Supreme Court has twice reserved for another day the issue of whether the filed rate doctrine applies in the face of fraud upon the agency.

Now, the Ratepayers of Georgia and Alabama turn to the U.S. Supreme Court for a resolution of the issue: "Does the filed rate doctrine bar a complaint setting forth causes of action under RICO (and other federal statutes) arising out of a public utility's fraud upon FERC and the state public service commissions which resulted in increased rates which the Ratepayers have paid?"

II. *THIS CASE CONFLICTS WITH A CONTINUING LINE OF SUPREME COURT CASES WHICH REFUSE TO PROTECT AN AGENCY DECISION OBTAINED THROUGH FRAUD*

Although this court has applied the filed rate doctrine in cases in which one party allegedly defrauds another, *see, e.g. Montana-Dakota Utilities Company v. Northwestern Public Service Company*, 341 U.S. 246 (1951), the Supreme Court has never applied the doctrine when faced with a claim that a fraud has been committed upon the agency itself. *Taffet*, 930 F.2d at 855. However, the Supreme Court has many times refused to protect agency decisions tainted with fraud. In *S&E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), the Supreme Court recognized the fraud exception holding that judicial review of a decision of the Atomic Energy Commission was appropriate when fraud was involved.

> Even where the contractor has obtained a judgment and the time for review of it has exp ed, fraud on an administrative agency or on the c urt enforcing the agency action is ground for setting aside the judgment. . . . [This] not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.

Id. at 15 (citations omitted).

Denying antitrust immunity to a party submitting false information to the U.S. Patent Office, this Court held:

> The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.

Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (citation omitted).

The Noerr-Pennington Doctrine, which protects joint lobbying efforts of government agencies from antitrust liability, does not protect "sham" conduct which has as its purpose the subversion of the agency process. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *California Motor Transp. v. Trucking, Unlimited*, 404 U.S. 508 (1972); *see also Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (no protection for a decision of the Civil Aeronautics Board tainted with fraud); *United States v. Wunderlich*, 342 U.S. 98 (1951) (no protection for a contract decision of the Department of the Interior tainted with fraud); *United States v. Moorman*, 338 U.S. 457 (1950) (no protection for a contract dispute resolution by Secretary of War tainted with fraud).

This case under review is founded upon court approval of a utility's fraud upon both Federal and state agencies. As such, it conflicts with every ruling of the Supreme Court which has considered and rejected policies which would protect parties from liability resulting from their fraud upon an agency.

III. *THE PLAINTIFFS SUFFERED AN INJURY TO PROPERY UNDER RICO § 1964(c)*

It is a critical question whether the Eleventh Circuit has found, in the filed rate doctrine, a limitation upon the application of RICO to fraudulent conduct by holding that the Ratepayer has no property interest in the fraudulently increased rate. In so limiting RICO, the Eleventh Circuit has challenged *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 which held:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expanded language and overall approach, but also of its express admonition that RICO is to be 'liberally construed to effectuate its remedial purposes'.

. . .

> It is not for the judiciary to eliminate the private action in situations where Congress has provided it. . . .

Id. at 497-500.

The Eleventh Circuit has also challenged the express congressional intent that RICO apply to subversion of the regulatory process. S. REP. No. 459, 100th Cong., 2d Sess. 6.

In holding that the Ratepayers have no property interest in their money paid as a result of the fraud, the opinion conflicts with two Supreme Court cases which have held that a consumer, who pays his or her money as a result of price increases resulting from violations of the antitrust laws, has suffered an injury to property under § 4 of the Clayton Act in the amount of the increase. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).[9]

In *Reiter*, the plaintiff consumer sought return of her money paid as a result of retail prices inflated by antitrust violations. The defendant contended that money for price increases was not an "injury to property." The court held:

> [I]t taxes the ordinary meaning of common terms to argue, as respondents do, that a consumer's monetary injury arising directly out of a retail purchase is not comprehended by the natural and usual meaning of the phrase 'business or property.' . . . A consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his. . . property' within the meaning of § 4.

Id. at 339.

Furthermore, in *County of Suffolk*, 907 F.2d at 1311, the Second Circuit recognized that the ratepayers had a property

[9]See footnote 8, *supra*.

right in the money they paid for the increased rate under 18 U.S.C. § 1964(c) (1988), holding that, to recover the fraudulent rate increases, the ratepayers must provide sufficient evidence that the misrepresentations of the electric utility to the public service commission were relied upon by the public service commission and that the misrepresentations caused the rate increases to be granted.

To create a limitation on the application of RICO in the face of a set of facts that clearly triggers RICO application by redefining the meaning of "injury to property" presents a very serious question. The Supreme Court must review this effort in the light of clear congressional intent, Supreme Court and Circuit Court precedent to the contrary, particularly where the result of that limitation is the legalization of fraud upon federal and state agencies.

IV. *THE ELEVENTH CIRCUIT OPINION IN PART CONFLICTS WITH THE SUPREMACY CLAUSE OF THE CONSTITUTION*

In its opinion the Eleventh Circuit has held that a cause of action created by Congress under RICO must yield to a filed rate doctrine emanating out of state legislation creating public service commissions. In other words, state legislation creating a state agency process prevails over congressional legislation creating RICO. This violates the Supremacy Clause and justifies reversal. U.S. Const., art. VI, cl. 2.

V. *THE ELEVENTH CIRCUIT GRATUITOUSLY UNDERTOOK TO CHANGE THE STANDARD OF PROOF FOR PREDICATE ACTS IN A RICO ACTION*

In its opinion, the Eleventh Circuit stated "[t]he RICO plaintiff, to recover, must show that the defendant is criminally

liable under section 1962." *Taffet* 967 F.2d at 1487. In *Sedima*, the Supreme Court stated:

> In a number of setttings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. There is no indication that Congress sought to depart from this general principle here.

473 U.S. at 491 (citations omitted).

At least six circuits have adopted the preponderance of evidence standard. *Cullen v. Margiotta*, 811 F.2d 698, 731 (2d Cir. 1987); *United States v. Local 560*, 780 F.2d 267, 279-280 n.12 (3rd Cir. 1985); *Combs v. Bakker*, 886 F.2d 673, 677 (4th Cir. 1989); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1296 (6th Cir. 1989);*Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302 (7th Cir. 1987); *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 531 (9th Cir. 1987).

This gratuitous pronouncement of the incorrect standard of proof in a RICO case must not be allowed to stand.

CONCLUSION

The fundamental policy underlying this case is whether the Supreme Court will countenance fraud upon a regulating governmental agency which is dependent upon the honesty of the regulated industry. Given that this Court has never done so and instead has found fraud upon governmental agencies to be repugnant conduct not worthy of any protection from civil liability, the Supreme Court should not hesitate to review a case where fraud upon an agency has been sanctioned. The Eleventh Circuit said

> The appellants contend also that the filed rate doctrine should not apply where a regulated entity allegedly has defrauded an administrative agency to obtain approval of a filed rate. Again, we disagree.

Taffet, 967 F.2d at 1494.

Where fraud on the agency has been sanctioned in conflict with other circuits, where the clear application of RICO as stated by the Supreme Court, by the Congress, and by the Second Circuit has been rejected, and where the standard of proof for RICO claims has been altered in conflict with all circuits that have faced the issue, this Court must not hesitate to grant review.

This ____ day of _____, 1992

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APPENDIX I

M.R. TAFFETT and Robert M. Fierman, on behalf of themselves and all of the persons, corporations, municipalities, and other entities, other than the defendants, who are similarly situated, Plaintiffs-Appellants,

v.

The SOUTHERN CO., Southern Company Services, Inc., Alabama Power Company and Arthur Andersen & Co., Defendants-Appellees.

Frederick Rodgers CARR, Carr Sales Company, O.E.M. Products, Inc.; Timothy Dunn Stokely, Clark Stokely, III and All Others Similarly Situated, Plaintiffs-Appellants,

v.

The SOUTHERN COMPANY, Southern Company Services, Inc., Georgia Power Company, and Arthur Andersen & Co., Defendants-Appellees.

Nos. 90-7088, 90-8452.

United States Court of Appeals,
Eleventh Circuit.

July 24, 1992

Utility customers brought RICO action against utilities which had allegedly obtained approval of rates through fraud. The United States District Court for the Middle District of Alabama, No. 89-V-712-N, Robert E. Varner, J., and the Southern

District of Georgia, No. CV189-118, Dudley H. Bowen, Jr., J., 731 F.Supp. 1067, dismissed, and customers appealed. The Court of Appeals reversed, 930 F.2d 847. The Court of Appeals granted rehearing, 958 F.2d 1514, and, Tjoflat, Chief Judge, held that under filed rate doctrine, customers had suffered no legally cognizable injury which could be the predicate for a RICO action.

Affirmed.

1. **Racketeer Influenced and Corrupt Organizations, 5, 62**

RICO plaintiff must show that defendant is criminally liable under the Act and that plaintiff has suffered injury that flows from the commission of the criminal violation. 18 U.S.C.A. § 1962.

2. **Racketeer Influenced and Corrupt Organizations 58**

Filed rate doctrine precluded utility customers from suffering a legally cognizable injury sufficient to predicate a RICO civil action based on claim that utilities had obtained unreasonably high rate based on fraudulent misstatements to state rate-setting commissions as, under the filed rate doctrine, customers had no right to be charged a lower rate than they were actually charged. 18 U.S.C.A. § 1964(c); Ala. Code 1975, § 37-1-1 et seq.; O.C.G.A. § 46-2-1 et seq.

3 **Public Utilities 119**

"Filed rate doctrine" recognizes that, where legislature has established scheme for utility rate making, rights of the ratepayer in regard to the rate he pays are defined by that scheme.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Public Utilities 119**

Under both Alabama and Georgia law, consumer does not have property rights in the utility rate he pays. Ala.Code 1975, § 37-1-1 et seq.; O.C.G.A. § 46-2-1 et seq.

5. **Public Utilities 120**

Under both Alabama and Georgia law, regulation of utilities in setting of utility rates is a purely legislative function. Ala. Code 1975, § 37-1-1 et seq.; O.C.G.A., § 46-2-1 et seq.

6. **Public Utilities 119**

Filed rate doctrine applies to state as as well as federal regulation of utilities.

7 **Public Utilities 119**

Filed rate doctrine applies even where regulated entity has defrauded administrative agency to obtain approval of filed rate.

8. **Public Utilities 123**

Regulated entity's allege fraud in obtaining approval of rate does not create a right to reasonable rate that exists independently of agency action.

Appeal from the United States District Court for the Middle District of Alabama.

Appeal from the United States District Court for the Southern District of Georgia.

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, HATCHETT, COX, and DUBINA, Circuit Judges.*

TJOFLAT, Chief Judge:

These two cases,[1] consolidated on appeal, raise the question whether a private suit under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1988), may be brought against a utility to recover for excessive charges for electrical power resulting from the utility's fraudulent and material misrepresentations to a state rate-setting commission. The appellants in these cases seek to represent those who have purchased electrical power from Georgia Power Company and Alabama Power Company (the Utilities), both of which are subsidiaries of The Southern Company. The appellants allege that the Utilities, in conspiracy with Arthur Andersen & Co., their independent accounting firm, understated their net income in rate applications to their state public service commissions (the PSCs) by improperly accounting for purchases of spare parts; thus, the Utilities fraudulently obtained rate increases.[2]

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*Judges Anderson, Edmondson, and Birch recused themselves and did not participate in this decision.

[1]Frederick Rodgers Carr, Carr Sales Company, and O.E.M. Products, on behalf of themselves and all similarly situated persons, corporations, and other entities, filed the first of these actions, No. 90-8452, on June 30, 1989 in the United States District Court for the Southern District of Georgia. M.R. Taffet and Robert M. Fierman, on behalf of themselves and all similarly situated persons, filed the second of these actions, No. 90-7088, on July 10, 1989 in the United States District Court for the Middle District of Alabama.

[2]The appellants' allegations are recounted in detail in *Taffet v. Southern Co.*, 930 F.2d 847, 849-50 (11th Cir.1991), *vacated*, 958 F.2d 1514 (11th Cir.1992) (per curiam).

The district courts below dismissed the appellants' complaints under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Both courts, finding that the exclusive authority to set rates for electricity is vested in the PSCs, based dismissal upon the filed rate doctrine, the primary jurisdiction doctrine, the clear statement doctrine, and abstention based upon federalism interests. *Taffet v. Southern Co.*, No. 89V-712N, 1990 U.S. Dist. LEXIS 4189, at *3-5 (M.D.Ala. Jan. 5, 1990); *Carr v. Southern Co.*, 731 F.Supp. 1067, 1071-72 (S.D.Ga.1990). On consolidated appeal to this court, a divided panel reversed; the majority rejected each of the doctrines relied upon by the district courts as a basis for dismissal of the cases at hand. *Taffet v. Southern Co.*, 930 F.2d 847, 851-57 (11th Cir.1991), *vacated*, 958 F.2d 1514 (11th Cir.1992) (per curiam). The dissent argued that the filed rate doctrine and the primary jurisdiction doctrine foreclose application of a RICO to a public utility after a rate has been approved by a state rate-making body; thus, the appellants' actions must be dismissed. *Id.* at 857 (Birch, J., dissenting).

A majority of this court's judges in regular active service ordered that the consolidated appeals be reheard by the court en banc. *Taffet v. Southern Co.*, 958 F.2d 1514 (11th Cir.1992) (per curiam).[3] On rehearing en banc, we affirm the district courts' dismissals of these actions.

I.

Section 1964(c) of RICO allows a private plaintiff to recover for injuries that he has suffered to his business or property as a result of a violation of the criminal prohibitions in section 1962 of RICO.[4] Section 1962 imposes criminal liability on

[3]That order vacated the panel's opinion.

[4]18 U.S.C. § 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C.§] 1962 . . shall recover threefold the damages he sustains. . . ." 18 U.S.C.§ 1964(c) (1988).

those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

Pelletier v. Zweifel, 921 F.2d 1465, 1495-96 (11th Cir.), *cert. denied* ____ U.S. ____, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991). Title 18 U.S.C. section 1961(1) lists the acts that constitute "racketeering activity" under RICO.[5] A "pattern"

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[5]18 U.S.C. § 1961(1) provides:

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations),

of racketeering activity consists of at least two acts of racketeering activity committed within ten years of each other (excluding any period of imprisonment). 18 U.S.C. § 1961(5) (1988).

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section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

18 U.S.C. § 1961(1) (1988 & Supp. II 1990). As we note *infra*, *see* note 6 and accompanying text, the appellants allege that the appellees committed the following acts of racketeering activity: mail fraud under 18 U.S.C. § 1341 (1988 & Supp. II 1990), wire fraud under 18 U.S.C. § 1343 (1988 & Supp. II 1990), and transportation in aid of racketeering activities under 18 U.S.C. § 1952 (1988 & Supp. II 1990).

[1] The RICO plaintiff, to recover, must show that the defendant is criminally liable under section 1962, *Pelletier*, 921 F.2d at 1496, and that the plaintiff has suffered an injury that "flow[s] from the commission of the [criminial violation]." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985) (footnote omitted).

In the instant cases, the appellants allege that they have suffered an injury to their business and property, within the purview of title 18 U.S.C. section 1964(c), in the form of excessive and illegal charges paid for electrical utility services, and that this injury is the proximate result of the appellees' racketeering activities, in violation of the prohibitions set forth in title 18 U.S.C. section 1962,[6] relating to their conspiracy

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[6]The appellants in No. 90-7088 (the Taffet appellants) allege in their complaint that The Southern Company, Southern Company Services, Inc., Alabama Power Company, and Arthur Andersen & Co. (collectively the Taffet appellees) committed or conspired in and aided the commission of numerous predicate acts involving the racketeering activity of mail fraud under 18 U.S.C. § 1341, and wire fraud under 18 U.S.C. §1343 including the following: (a) the mailing of Alabama Power Company's rate applications that included fraudulent accounting for inventory spare parts; (b) the mailing of Alabama Power Company's quarterly reports that included fraudulent accounting for inventory spare parts; (c) the mailing to Alabama Power Company's customers of millions of monthly billing statements that included fraudulent rate charges derived from fraudulent accounting for inventory spare parts; (d) the mailing of Form 3115 (regarding a proposed change in accounting, for tax purposes, of spare parts) to the Internal Revenue Service (IRS) in an effort to deceive the IRS; (e) the participation in the preparation of false rate applications that the Taffet appellees knew would be mailed to the Alabama PSC, which materials were predicated in part on fraudulent accounting for inventory spare parts; (f) the participation in the preparation of false annual, quarterly, and monthly reports that the Taffet appellees knew would be mailed to the Alabama PSC, which reports were predicated in part on fraudulent accounting for inventory spare parts; (g) the preparation and mailing by Arthur Andersen & Co. to The Southern Company, Southern Company Service, Inc.; and Alabama Power Company on numerous occasions of fraudulent accounting information relating to or constituting fraudulent rate applications, financial statements, reports, audits, federal tax returns, and cost of service data, which materials were predicated in part on fraudulent accounting

and scheme to obtain PSC approval of excessive rate increases by means of fraudulently accounting for spare parts held in inventory.

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accounting for inventory spare parts; and (h) the participation in hundreds of telephone calls between the Taffet appellees and other co-conspirators and between the Taffet appellees and the Alabama PSC for the purpose of perpetuating the scheme and conspiracy relating to the inventory spare parts.

The Taffet appellants allege that the Taffet appellees' misconduct is a violation of 18 U.S.C. § 1962(c) in that they have been associated with an enterprise engaged in interstate commerce, and the activities of the enterprise have affected interstate commerce, and, further, that they have conducted or participated in the conduct of the enterprise's affairs through a pattern of racketeering activity. Moreover, the Taffet appellants allege, the Taffet appellees have violated 18 U.S.C. § 1962(d) by conspiring among themselves and with others to violate 18 U.S.C. § 1962(c).

The appellants in No. 90-8452 (the Carr appellants) allege in their complaint that The Southern Company, Southern Company Services, Inc., Georgia Power Company, and Arthur Andersen & Co. (collectively the Carr appellees) have violated 18 U.S.C. §§ 1962(a), (c), and/or (c) by engaging in prohibited racketeering activities, including, but not limited to, using income derived from the rate-payers through a scheme of racketeering activity, maintaining an interest in or control of an enterprise engaged in or affecting interstate commerce through a pattern of racketeering activity, and conducting the enterprise's affairs through a pattern of racketeering activity. The Carr appellants further allege that the Carr appellees violated 18 U.S.C. § 1962(d) by conspiring between themselves and with others to violate §§ 1962(a), (b), and (c).

The specific acts of racketeering alleged by the Carr appellants, which they contend constitute mail fraud under 18 U.S.C. § 1341, wire fraud under 18 U.S.C. § 1843, and violations of 18 U.S.C. § 1952 (transportation in aid of racketeering enterprises), include the following: (a) the mailing of Georgia Power Company's periodic filings and submissions that included fraudulent accounting for maintenance spare parts; (b) the mailing to Georgia Power Company's customers of millions of monthly billing statements that included fraudulent rate charges, overcharges, and increases to rate-payers derived from the Carr appellees' fraudulent accounting for maintenance spare parts; (c) the mailing of Georgia Power Company's Forms 3115 to the IRS to defraud the IRS; (d) the participation in the preparation of false filings and submissions to the Goergia PSC, the

The appellants' argument rests on the assumption that they enjoy a legal right to have been charged a lower rate than they actually were charged; the appellants, unless they enjoy such a right, have suffered no legally cognizable injury by having paid the higher rate. We conclude that the appellants do not possess this right; therefore, they have failed to state a claim upon which relief can be granted under RICO.

A.

[2] We find support for our conclusion that the appellants have not suffered a legally cognizable injury sufficent to predicate a RICO civil action in a line of Supreme Court cases that developed what has come to be known as the "filed rate

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Federal Energy Regulatory Commission, and the Securities and Exchange Commission, and in the preparation of financial statements, reports, audits, and cost of service data that the Carr appellees knew or reasonably should have anticipated would be mailed to the Georgia PSC, among others, which materials were predicated in part on fraudulent accounting for maintenance spare parts; (e) the participation in the preparation, mailing, and telephonic discussion by the Georgia Power Company's audit committee of annual examinations of the affairs of the company, which examinations were predicated in part on fraudulent accounting for maintenance spare parts; (f) the participation in the preparation of false annual reports that the Carr appellees knew or reasonably should have anticipated would be mailed to the PSC, which reports were predicated in part on fraudulent accounting for maintenance spare parts; (g) the preparation and mailing by Arthur Andersen & Co. to The Southern Company, Southern Company Services, Inc., and Georgia Power Company on numerous occasions of fraudulent accounting information relating to or constituting fraudulent filings and submissions, financial statements, reports, audits, federal tax returns, and cost of service data that the Carr appellees knew or reasonably should have anticipated would be mailed to the Georgia PSC, among others, which materials were predicated in part on fraudulent accounting for maintenance spare parts; (h) the participation in numerous telephone calls between the Carr appellees and other co-conspirators and between the Carr appellees and the Georgia PSC for the purpose of creating and perpetuating the scheme and conspiracy relating to the maintenance spare parts; and (i) the use of facilities in interstate commerce to promote the Carr appellees' unlawful activities.

doctrine." The origin of the filed rate doctrine can be traced back to *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed.553 (1907), in which the Supreme Court addressed the issue of whether a shipper could maintain a common law action for damages against a comon carrier for "the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission. . . . " *Id.* at 436, 27 S.Ct. at 353. The Court held that the shipper could not maintain such an action. After acknowledging that, at common law, a shipper had a right of action for damages against a carrier who refused to carry goods except upon the payment of an unreasonable sum, *id.*, the Court held that the Interstate Commerce Act implicitly had changed the common law, *id.*, at 436, 27 S.Ct. at 353-54, and that the shipper's only redress was through the Interstate Commerce Commission (ICC) which had the power to alter established rates. *Id.* at 448, 27 S.Ct. at 358. The Court reasoned that the existence of a shipper's right to recover damages on the basis that the established rate was unreasonable was "wholly inconsistent with the administrative power conferred upon the [ICC], and with the duty, which the [Interstate Commerce Act] casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." *Id.* at 440-41, 27 S.Ct. at 355.

Following *Abilene Cotton*, federal courts have applied the filed rate doctrine in a variety of contexts to bar recovery by those who claim injury by virtue of having paid a filed rate. *See, e.g. Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922) (plaintiff may not recover under federal antitrust laws for asserted injury related to paying the rate approved by the ICC); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir.), *cert. denied* ____ U.S. ____, 112 S.Ct. 2306, 119 L.Ed.2d 228 (1992) (filed rate doctrine precludes suit under RICO to recover claimed damages

relating to allegedly fraudulent rate approved by the Minnesota Public Utilities Commission). In *Keogh*, the Supreme Court held that a private shipper could not recover damages under the federal antitrust laws against carriers who allegedly had fixed rates in violation of those laws. As in *Abilene Cotton*, the rates at issue had been filed with the ICC. The Court held that the shipper's payment of the approved rates could not give rise to an injury to business or property prerequisite to recovery under the antitrust laws. *Keogh*, 260 U.S. at 162-63, 43 S.Ct. at 49-50. The Court reasoned

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163, 43 S.Ct. at 49 (citation omitted).

More recently, the Supreme Court reaffirmed the rule of *Keogh*. In *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986), the plaintiffs alleged that they had been forced to pay excessive rates for interstate shipping because the defendants collectively had engaged in price-fixing, in violation of the Sherman Act, pursuant to an agreement filed with the ICC. The plaintiffs sought treble damages, measured by the difference between the rates they paid and the rates that they allegedly would have paid in a freely competitive market. The Supreme Court noted that the rates at issue were "duly submitted, lawful rates under the Interstate Commerce Act," *id.* at 417,

106 S.Ct. at 1927, and, following the rule of *Keogh*, held that even if the plaintiffs' allegations of price-fixing were true, the plaintiffs could not have been injured in their business or property within the meaning of the antitrust laws by paying the rate approved by the ICC. *Id.* at 416-17 & 423-24, 106 S.Ct. at 1926-27 & 1930-31.

The seminal case applying the filed rate doctrine in the context of electric utility rates is *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951). The dispute in *Montana-Dakota Utilities* arose from a series of contracts entered into between the parties, both of whom were electric utilities companies. The contracts established rates that each paid to the other for electric power. The rates established were filed with and accepted by the Federal Power Commission which the Federal Power Act, 16 U.S.C. § 824e(a) (1988), charged with fixing reasonable electric utility rates.[7] The plaintiff alleged that the defendant's fraud in connection with the setting of these rates deprived it of its right under the Federal power Act to have reasonable rates and charges for electric power. It sought as damages the difference between the filed rates and the rates that would have been set absent the defendant's alleged fraud. The Supreme Court affirmed the dismissal of the claim, ruling that the plaintiff had not established a cause of action under the Federal Power Act because it had no right under the Act to pay any rates other than the rates approved by the Federal power Commission. *Id.* at 251-255, 71 S.Ct. at 695-97. The Court explained:

> [T]he problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending

[7]Congress has terminated the Federal Power Commission and has transferred its powers to the Secretary of Energy and the Federal Energy Regulatory Commission. 42 U.S.C. §§ 7151(b), 7172(a), 7291, 7293 (1988).

> that they are so empowered . . . regard[s] reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate. . . . It is not the disembodied "reasonableness" but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.
>
> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. *It can claim no rate as a legal right that is other than the filed rate* . . .

Id. at 251, 71 S.Ct. at 695 (emphasis added).

[3] As the cases discussed above illustrate, the filed rate doctrine recognizes that where a legislature has established a scheme for utility rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme. To determine whether the appellants in the cases at hand have alleged a cognizable injury to their business or property within the purview of RICO, we examine the rate-making schemes in Alabama and Georgia which define the rights these appellants enjoy in regard to the rates they pay for electric power.

B.

[4,5] It is settled under both Alabama and Georgia law that a consumer does not have a property right in the utility rate

he pays. *See Alabama Metallurgical Corp. v. Alabama Pub. Serv. Comm'n,* 441 So.2d 565, 570 (Ala. 1983) ("a consumer has no property right in a given level of utility rates"); *Georgia Power Co. v. Allied Chem. Corp.*, 233 Ga. 538, 212 S.E.2d 628, 631 (1975) ("consumer has no 'property' right in the rate he pays for utilities"). In both states, regulation of utilities and setting of utility rates is purely a legislative function. *Alabama Metallurgical,* 441 So.2d at 570; *Georgia Power Co. v. Georgia Pub. Serv. Comm'n,* 196 Ga.App. 572, 396 S.E.2d, 568 (1990). Thus, the only "rights" that the appellants have in relation to utility rates are those that the legislature of Alabama or Georgia provide.

Alabama and Georgia each have elaborate administrative schemes to ensure that rates for electricity are just and reasonable for the affected utilities and for the public. *See* Ala.Code § 37-1-1 et seq. (1975) (Supp. 1991); O.C.G.A. § 46-2-1 et seq. (1982) (Supp.1991). In Alabama, the legislature has delegated the responsibility for the determination of utility rates and of what constitutes a fair rate of return to the Alabama PSC. *Alabama Power Co. v. Alabama Pub. Serv. Comm'n,* 422 So.2d 767, 769 (Ala.1982). Thus, the PSC has exclusive authority to set electrical power rates. Ala.Code § 37-1-31. Whenever a utility wishes to change an existing rate, it must file a new rate schedule with the PSC. *Id.* at § 37-1-81(a). The new rate becomes effective after thirty days or at a later date specified in the rate schedule unless the PSC disapproves the rate. *Id.* Further, the PSC can suspend or disapprove a rate at any time so long as it acts in accordance with procedures prescribed by the legislature. *Id.*

Upon written complaint by a rate-payer that an effective or proposed rate is unfair, the Alabama PSC has the duty to investigate the reasonableness of the challenged rate. *Id.* at § 37-1-83. If the rate-payer is dissatisfied with the PSC's disposition of his complaint, he may appeal the PSC's action

directly to the Alabama Supreme Court. *Id.* at § 37-1-140 (Supp. 1991). The role of the Alabama judiciary is to ensure that the PSC has carried out its regulatory function within constitutional limits. *Alabama Metallurgical,* 441 So.2d at 570. Thus, a "[c]ourt's inquiry ordinarily goes no further than to ascertain whether there is evidence to support the findings of the [PSC]." *Alabama Power,* 422 So.2d at 769 (quoting *Alabama Gas Corp. v. Wallace,* 293 Ala. 594, 308 So.2d 981, 984 679 (1975)). Alabama courts neither make rates nor substitute their judgment for that of the PSC. *Continental Tel. Co. of the S. v. Alabama Pub. Serv. Comm'n,* 427 So.2d 981, 984 (Ala.1982). Indeed, the Alabama Supreme Court has stressed that the judiciary has no authority to set utility rates. *Alabama Metallurgical,* 441 So.2d at 570.

The scheme for regulating utilities and setting utility rates under Georgia law is similar to the Alabama scheme discussed above. The General Assembly of Georgia has vested the Georgia PSC with "exclusive power to determine what are just and reasonable" electric power rates. O.C.G.A. § 46-2-23(a) (Supp.1991). An electric utility must file a rate schedule with the PSC at least thirty days before a new rate is scheduled to go into effect. *Id.* at § 46-2-25(a). The PSC, upon written complaint or upon its own initiative, may then conduct a hearing concerning the proposed rate. *Id.* at § 46-2-25(b).

Georgia's Assembly sought to ensure that the consumers of utility services are adequately represented in proceedings affecting utility rates and services. *See* 1981 Ga.Laws 122. Thus, anyone with an interest in the rate-determination proceeding may file a motion to intervene in the proceeding. *Id.* at § 46-2-59. A person who has exhausted the administrative remedies available before the PSC and who is "aggrieved" by the PSC's rate-making decision may seek judicial review of the decision first in the Superior Court of Fulton County,

and, then, in the Georgia Court of Appeals or the Georgia Supreme Court. *Id.* at §§ 50-13-19 to -20 (1990).[8] Georgia courts recognize, however, that "[t]he legislative function of rate-making . . . is essentially a matter for the Public Service Commission, and not the judiciary." *State Farm Fire & Casualty Co. v. Southern Bell Tel. & Tel. Co.*, 150 Ga.App. 622, 258 S.E.2d 198, 199 (1979), *rev'd on other grounds*, 245 Ga. 5, 262 S.E.2d 895 (1980). Accordingly, a court reviewing the reasonableness of a utility rate "shall not substitute its judgment for that of the [PSC] if there is any evidence to support its findings." *Lasseter v. Georgia Pub. Serv. Comm'n*, 253 Ga. 227, 319 S.E.2d 824, 829 (1984).

The rate-setting schemes in both Alabama and Georgia are incompatible with a rate-payer's cause of action to recover damages measured by the difference between the filed rate and the rate that would have been charged absent some alleged wrong-doing. Allowing consumers of the Utilities' services to recover damages for "fraudulent" rates or otherwise "erroneous" rates would disrupt greatly the states' regulatory schemes and, in the end, would cost consumers dearly. For the appellants in these cases to recover, they first would have to establish that the rates set by the PSC were in fact unreasonable. Thus, the trial judge, or a jury, would have to determine what rate should have been set by the PSC. Regardless of what the PSC has determined is a reasonable rate, a trial court would be empowered to set, in effect, a new rate.[9]

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[8]Section 50-13-20 of the Official Code of Georgia provides: "An aggrieved party may obain a review of any final judgment of the superior court under [the Georgia Administrative Procedure Act] by the Court of Appeals or the Supreme Court, as provided by law." O.C.G.A. § 50-13-20 (1990).

[9]A trial court's judgment awarding damages in such a case would not set a new rate: in effect, however, the judgment would do so — in the form of money damages — as the ensuing discussion demonstrates.

The court's damages award would have the effect of retroactively reducing the rate for electric power; the Utilities would, in essence, be forced to refund to each of their customers the amount allegedly overcharged.[10] Moreover, if the "erroneous" rate were still in effect when the court determined it to be erroneous, the Utilities might be forced to adopt the court's rate or risk future liability.

Of course, it is the Utilities' present and future customers who would get stuck with the bill in the end. The Utilities' litigation costs, the awarded damages and attorneys' fees, and any revenue lost because of an erroneous court-set rate would become part of each Utility's rate base. It is likely that the PSCs would take all of this into account when setting a future rate for electricity, especially if the PSC disagreed with the district court's determination of a reasonable rate. Even if the PSCs would not allow the Utilities to recoup in a new rate all of the costs stemming from the appellants' suit, the Utilities still would recoup those costs at the expense of the future customers by cutting the quality of service they provide to those customers.

There is another way in which damage awards for "erroneous" rates would undermine the states' regulatory schemes. Alabama and Georgia both have chosen to establish procedures that allow public participation in the rate-making process. Allowing plaintiffs to collect damages measured by the difference between the filed rate and the rate a court finds reasonable would encourage consumers of a utility's services to sit out the state's rate'making process and then to repair to court to play litigation lottery. There could be no end to

[10]As we have noted, *see supra* note 4, a successful plaintiff under RICO recovers his damages threefold. *See* 18 U.S.C. § 1964(c). Thus, if the appellants in the cases at hand were successful in prosecuting their RICO claims, the Utilities would be forced to refund three times the amount allegedly overcharged.

the number of strike suits that would be brought as eager lawyers, using the class action vehicle, circumvent the states' rate-making mechanisms — all at the expense of consumers.

Rather than provide for a right to recover damages, Alabama and Georgia have structured their rate-making schemes so the the PSCs can provide a remedy for the defendants' fraud that will adequately compensate the appellants while not undermining the PSCs' authority to set reasonable rates: in both Georgia and Alabama, the PSC can set a prospective rate low in order to compensate consumers for excessive rates they paid in the past that were procured by fraud.

It is true that under Alabama law, a PSC cannot declare retrospectively that a rate it previously approved was unreasonable and, therefore, unlawful. *See* Ala. Code § 37-1-97; *T.R. Miller Mill Co. v. Louisville & Nashville R.R. Co.*, 207 Ala. 253, 92 So. 797, 801 (1921). Also, even if the PSC or a court declares that a previously approved rate was excessive, it may not order the utility to refund the excess to consumers. *See, e.g. Foshee v. General Tel. Co.*, 295 Ala. 70, 322 So.2d 715, 717 (1975); *State v. Alabama Pub. Serv. Comm'n*, 293 Ala. 553, 307 So.2d 521, 539 (1975). Alabama law, however, directs the PSC to set prospective rates that are "reasonable and just to both the utility *and the public*." Ala.Code § 37-1-80 (Supp.1991) (emphasis added). Rate-payers, as persons affected by an excessive rate obtained by fraud, may file a complaint with the PSC, *id.* § 37-1-83; if the PSC, upon investigation of the complaint, determines that the rate is indeed excessive or unfair, it must set a reasonable rate — one that is fair to both public and utility — to be followed in the future, *id.* § 37-1-97. It would seem that a reasonable rate in a case in which the past rate was unreasonable because the utility defrauded the PSC would be low enough to ensure that

consumers future bills compensate them for the excess they paid in the past.[11]

To be sure, Alabama law entitles utilities to a fair net return. *See* Ala.Code § 37-1-80 (Supp.1990) (utilities must get "such just and reasonable rates as will enable [them] at all times to fully perform [their] duties to the public and will, under honest, efficient and economical management, earn a fair net return on the reasonable value of [their] property devoted to public service"). Moreover, rates of return "should be *prospective* rather than *retrospective* in nature," *Alabama Metallurgical*, 441 So.2d at 569, and "must correspond to the actual needs of the company during the time they are in effect," *Alabama Power Co.*, 422 So.2d at 773. *See also, e.g., Alabama Gas Corp. v. Alabama Pub. Serv. Comm'n*, 425 So.2d 430, 436 (Ala.1982) ("in determining the reasonableness of rates, it is necessary to consider the effect of rates in light of the utility's present situation").

Although this might suggest that the PSC could never award future low rates because of past misconduct, the Alabama Supreme Court has indicated that past misconduct — improper or dishonest management — is a relevant consideration in

[11]This is consistent with the rule that the PSC may not order the utility to make direct restitutions to consumers. The utility's administrative costs involved in making such restitutions — calculating how much has been paid to each past consumer, locating that consumer, and sending exact payment — would be huge in comparison to the payments. If the utility were allowed to include those expenses in its rate base for future rate setting proceedings, consumers might end up paying more (in future, higher rates) than they gained through the restitutions. Alternatively, if the utility were barred from including those expenses in its rate base, it most likely would [illegible] administrative costs by reducing the quality of service to consumers. The PSC, however, calculated the utility's gains from its fraud [illegible] future consumers' rates across the board to reflect that illegal gain, the utility's administrative costs would be minimal. Of course, this method of making consumers whole would not be as exact as direct restitutions, but it would adequately compensate them without the problem we have outlined above.

determining whether a rate provides a fair return to a utility. In *Continental Telephone Company v. Alabama Public Service Commission*, 376 So.2d 1358 (Ala. 1979), *overruled on other grounds by Alabama Gas Corp. v. Alabama Pub. Serv. Comm'n*, 425 So.2d 430 (Ala.1982), for instance, the Alabama Supreme Court stated that "[i]mproper management may always be considered by the [PSC] in determining a fair rate of return." *Id.* at 1368. Similarly, the court has noted that "a utility is under a duty . . . to manage its business *honestly*, efficiently, and economically. *If* the company performs these functions, it is entitled to a rate of return that will be fair to it and fair to the consuming public." *Continental Tel. Co. v. Alabama Pub. Serv. Comm'n*, 479 So.2d 1195, 1214-15 (Ala.1985) (emphasis added); *cf. Continental Tel.*, 427 So.2d at 988 (PSC "required to grant only those rates consistent with good management practices"); *Alabama Power Co.*, 422 So.2d at 773 (implying that evidence "that the basic date submitted [to the PSC] by the [utility] were inaccurate or that the [utility] was guilty of inefficient or dishonest management" should be considered by the PSC in determining a reasonable rate of return on the utility's investment); *Birmingham Elec. Co. v. Alabama Pub. Serv. Comm'n*, 254 Ala. 140, 47 So.2d 455, 460 (1949) (standards for reasonable rate of return "presuppose[ ] efficient, economical and honest management").

Likewise, Georgia has recognized that the PSC may consider dishonest or improper management in setting the rate for a utility's services. *See Georgia Power Co.*, 396 S.E.2d at 569 (PSC may exclude from calculation of utility's investment in public service "what might be found to be dishonest or obviously wasteful or imprudent expenditures"). While, like Alabama law, Georgia law forbids the PSC from retroactively declaring filed rates illegal or awarding reparations for excesses paid by consumers, *see Georgia Pub Serv. Comm'n v. Atlanta Gas Light Co.*, 205 Ga. 863, 55 S.E.2d 618, 631 (1949), as

in Alabama law, nothing in Georgia law forbids the PSC from setting prospective rates that are low enough to compensate consumers for excesses paid in the past because a utility defrauded the PSC. Georgia law requires the PSC to set rates that are "just and reasonable," O.C.G.A. § 46-2-23(a), "for the utility . . .for present customers of the utility . . . for future customers of the utility, and . . . in the entire public interest. . . ." *Georgia Power Co.*, 396 S.E.2d at 568 (quoting *Georgia Power Co. v. Georgia Pub. Serv. Comm'n*, 231 Ga. 339, 201 S.E.2d 423, 425 (1973). Certainly, the PSCs would be acting in the public interest by taking into account the defendant's alleged fraud when setting future rates.

Given that the PSCs are equipped to take the defendants' fraud into account in setting future rates, a court's award of damages against a utility for "fraudulent rate-making" would be unnecessarily disruptive to the state's scheme of utility regulation.

In sum, the legislatures of both Alabama and Georgia have provided by law that the PSCs shall establish the legal rate for a utility's services. A consumer of a utility's services has the right to participate in the rate-setting process within the parameters set up by the legislature. The consumer, however, has no legal right to pay any rate other than the one established by the PSC.

The appellants in the instant cases paid utility rates established by the PSCs. They had no legal right to pay any other rate. Since "[i]njury implies violation of a legal right," *Keogh*, 260 U.S. at 163, 43 S.Ct. at 49, the appellants suffered no legally cognizable injury by virtue of paying the filed rate. Thus, the appellants have failed to state a claim upon which relief can be granted under RICO.

C.

[6] The appellants raise two issues regarding the application of the filed rate doctrine to the cases at hand that merit some discussion. First, the appellants submit that the filed rate doctrine is a federal doctrine that applies only to rates approved by federal regulatory agencies. They contend that the filed rate doctrine and the principles underlying it are, therefore, wholly inapposite to the instant cases since the rates in question in these cases were approved by state, not federal, regulatory authorities. We disagree.

Where the legislature has conferred power upon an administrative agency to determine the reasonableness of a rate, the ratepayer "can claim no rate as a legal right that is other than the filed rate. . . ." *Montana-Dakota Utilities*, 341 U.S. at 251, 71 S.Ct. at 695. This principle, which is central to the filed rate doctrine and to our decision today, applies with equal force to preclude recovery under RICO whether the rate at issue has been set by a state rate-making authority or a federal one. *See H.J. Inc.*, 954 F.2d at 494 ("the filed rate doctrine applies whether the rate in question is approved by a federal or state agency").[12]

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[12]Moreover, the filed rate doctrine principles that the Supreme court explicated in the context of adjudicating claims under the federal antitrust laws apply as readily in the context of a RICO adjudication. Congress modeled the civl remedy provision of RICO, 18 U.S.C. § 1964(c), after section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1988 & Supp. II 1990), *Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, ___, 112 S.Ct. 1311, 1317, 117 L.Ed.2d 532 (1992); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 n. 8, 105 S.Ct. 3275, 3281 n. 8, 87 L.Ed.2d 346 (1985), the provision pursuant to which the plaintiffs in *Keogh* and *Square D* sought to obtain trebled damages. Indeed, both statutes confer standing to bring a private civil action in the exact same language: only upon a person "injured in his business or property. . . "

Congress passed RICO in 1970, 48 years after the Supreme Court held in *Keogh* that one is not "injured in his business or property" when one

[7, 8] The appellants contend also that the filed rate doctrine should not apply where a regulated entity allegedly has defrauded an administrative agency to obtain approval of a filed rate. Again, we disagree. A regulated entity's alleged fraud does not create a right to a reasonable rate that exists independently of agency action. Thus, even if the filed rate is obtained through fraud, it remains true that one does not suffer the predicate "injury to business or property" by paying the filed rate. *Cf. H.J. Inc.*, 954 F.2d at 489 ("the impact [a civil action] will have on agency procedures and rate determinations," rather than the defendant's underlying conduct, controls whether the filed rate doctrine applies).[13]

II.

Based on the foregoing, we AFFIRM the district court's dismissals of the appellants' claims.

IT IS SO ORDERED.

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pays the rate set by an agency with rate-making authority. We presume that Congress, when it conferred standing under RICO to one "injured in his business or property," intended that this language conferring standing would be interpreted just as § 4 of the Clayton Act had been. As the Supreme Court stated recently: "We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes*, ____ U.S. at ____, 112 S.Ct. at 1317-18 (citations omitted).

[13]The appellees argue that the district courts' dismissals of these cases should be affirmed on the basis of *Burford* abstention, the primary jurisdiction doctrine, and the clear statement doctrine. In light of our holding that the appellants have not suffered an injury cognizable under RICO, we do not address these arguments.

APPENDIX II

M.R. TAFFETT and Robert M. Fierman, on behalf of themselves and all of the persons, corporations, municipalities, and other entities, other than the defendants, who are similarly situated, Plaintiffs-Appellants,

v.

The SOUTHERN CO., Southern Company Services, Inc., Alabama Power Company and Arthur Andersen & Co., Defendants-Appellees.

Frederick Rodgers CARR, Carr Sales Company, O.E.M. Products, Inc.; Timothy Dunn Stokely, Clark Stokely, III and All Others Similarly Situated, Plaintiffs-Appellants,

v.

The SOUTHERN COMPANY, Southern Company Services, Inc., Georgia Power Company, and Arthur Andersen & Co., Defendants-Appellees.

Nos. 90-7088, 90-8452.

United States Court of Appeals,
Eleventh Circuit.

May 6, 1991

Customers of utility brought Racketeer Influenced and Corrupt Organizations Act (RICO) and related actions against utilities which had allegedly engaged in fraud that resulted in higher rates. The United States District Court for the Middle

District of Alabama, No. 89-V-712-N, Robert E. Varner, J., and the United States District Court for the Southern District of Georgia, No. CV189-118, Dudley H. Bowen, Jr., J., 731 F.Supp. 1067, dismissed, and customers appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) claims were not barred by the filed rate doctrine or the clear statement doctrine, and (2) court was not required to abstain under *Burford* or the primary jurisdiction doctrine.

Reversed and remanded.

Birch, Circuit Judge, dissented and filed an opinion.

1. Federal Courts 754

Dismissal, as a question of law, is subject to plenary review by the appellate court.

2. States 18.11

Under the "clear statement doctrine," federal court should not apply federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area.

See publication Words and Phrases for other judicial constructions and definitions.

3. Racketeer Influenced and Corrupt Organizations 2

States 18.73

"Clear statement doctrine" did not preclude application of Racketeer Influenced and Corrupt Organizations Act (RICO) to

actions of utilities which allegedly engaged in fraud which led to higher rates. 18 U.S.C.A. § 1962.

4. Federal Courts 47

Although abstention rulings premised on principles of comity and federalism were originally developed in the context of action seeking equitable relief, those principles also apply to action seeking monetary damages.

5. Federal Courts 47

Burford abstention was not applicable to actions brought by customers of utilities against the utilities based based on an allegation that they had engaged in fraud which resulted in higher rates, even though issue of damages would involve determination of what a proper rate should have been.

6. Administrative Law and Procedure 228

Rationales for primary jurisdiction doctrine are that the agency has a superior expertise in the area in question and that there is a need for uniformity in interpretation of a statute or regulation on a subject with which Congress has entrusted an agency.

7. Administrative Law and Procedure 228

Electricity. 11.3(1)

Primary jurisdiction doctrine did not preclude consideration of claims of fraud by public utilities which allegedly resulted in higher rates, even though damages would be measured by determination of what the proper rate should have been, as the essential issue in the case was not what a reasonable rate

would be but whether the utilities had committed fraud and Racketeer Influenced and Corrupt Organizations Act (RICO) violations. 18 U.S.C.A. § 1962.

8. Electricity 11.3(1)

Primary jurisdiction doctrine did not preclude court from considering claims that utility had engaged in fraud, which resulted in higher rates, merely because the district court's calculations of the damages might not be mathematically precise.

9. Administrative Law and Procedure 228

Federal Courts 41

In a situation in which an issue has been entrusted to one overarching federal agency, abstention by federal courts under the "primary jurisdiction" doctrine allows an agency to develop uniform policies which in turn produce even-handed, uniform results; where issue lies within domain of agencies created by the various states, uniformity is neither expected nor prized.

10. Public Utilities 119

Under the "filed rate doctrine," courts are barred from imposing a rate different than the rate filed with the regulating agency and the agency cannot alter a rate retroactively; courts are thus also generally considered without authority to award a party what might amount to a retroactive rate based on speculation about what the regulating agency might have done if it had been faced with the facts.

See publication Words and Phrases for other judicial constructions and definitions.

11. Public Utilities 119

Policy behind the "filed rate" doctrine is to preserve the regulating agency's authority over the setting of reasonable rates.

12. Racketeer Influenced and Corrupt Organizations 10

It would not violate the "filed rate" doctrine to permit customers to maintain action for fraud under Racketeer Influenced and Corrupt Organizations Act (RICO) against public utilities which allegedly engaged in fraud that resulted in higher rates. 18 U.S.C. §1962.

13. Racketeer Influenced and Corrupt Organizations 59

Utility customers alleged a legally cognizable Racketeer Influenced and Corrupt Organizations Act (RICO) injury by alleging that actions of utilities resulted in higher rates which required customers to pay more for services; money which they lost as a result of the alleged RICO violations was an "injury to business or property." 18 U.S.C.A. §1964(c).

Appeal from the United States District Court for the Middle District of Alabama.

Appeal from the United States District Court for the Southern District of Georgia.

Before JOHNSON and BIRCH, Circuit Judges, and MERHIGE*, Senior District Judge.

*Honorable Robert R. Merhige, Jr., Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

JOHNSON, Circuit Judge:

In both of these class actions, the plaintiffs appeal the district courts' grant of defendants' motions to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6)[1]. These appeals require us to address issues of first impression in this Circuit, including the applicability of the clear statement doctrine, *Burford* abstention, the primary jurisdiction doctrine, and the filed rate doctrine to suits by consumers against state-regulated utilities. We reverse the district courts and remand for trials on the merits.

I. STATEMENT OF THE CASE

A. *Factual Background*

Alabama Power Company and Georgia Power Company, two subsidiaries of the Southern Company, are required by the Internal Revenue Service ("IRS") to use an accounting method by which the companies "expense" on their books maintenance spare parts in the year used rather than the year purchased. They are also required to depreciate emergency parts over the life of the equipment rather than to expense them at the time they are initially purchased or put into service. At least as early as 1981, however, the two subsidiaries were allegedly expensing spare parts contrary to the regulations. The effect of the improper accounting was to overstate the utilities' expenses and understate their income.

In 1982, with the help of the accounting firm of Arthur Andersen & Company, both utilities allegedly devised schemes

[1]The cases before us have been consolidated on appeal. The *Taffet* case arises from the Middle District of Alabama, and the *Carr* case arises from the Southern District of Georgia.

to cover up the wrongful accounting. The two utilities filed requests for a change in accounting method with the IRS for the stated purpose of properly reflecting their spare-part inventories for federal tax purposes. But the two utilities declared to the IRS only a small portion of the amount of spare parts that they had previously improperly expensed. This had the effect of making their inventories appear smaller than they actually were. The utilities then allegedly established dual sets of books. Each utility kept one set of accounts for the IRS. But other records, recorded on personal computers, kept track of the true amount of inventory. As the utilities reduced their inventory of previously expensed parts, deductions from the inventory listings on the secret books would be made, but deductions would not be made from the books kept for the IRS until it appeared advantageous to do so. This dual bookkeeping system allowed the utilities to use up a large amount of the previously improperly expensed parts without the wrongful accounting being discovered.[2] The practice continued until 1988 when an undercover investigator for the IRS unmasked the scheme.

The improper accounting was profitable not only because it resulted in a reduced or deferred tax burden but because it influenced the rates the utilities could charge their customers. In both Alabama and Georgia, the utilities may charge only the rates established by the state Public Service Commission ("PSC"). The PSC sets the rate according to the profitability of the utility. The smaller the utility's income appears, the more likely the PSC is to approve a rate hike.

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[2]In 1986, Georgia power may have had on hand as much as $117,903,014.58 worth of spare parts which had already been expensed but had not been used.

B. *Procedural History*

Within a few days of each other, two class actions were filed. Customers of Alabama Power initiated a class action against Alabama Power, Southern Company and Arthur Andersen & Company (''the Taffet class''), and customers of Georgia Power initiated a class action against Georgia Power, Southern Company and Arthur Andersen & Company (''the Carr class''). Both suits limited the proposed class to customers who purchased electricity from the approval date of the utility's rate application in 1981 to the date of the court's order.

The Taffet class alleged violations of the Racketeer Influenced and Corrupt Organizations Act (''RICO'') under 18 U.S.C.A. §§ 1961-1968 and fraud in violation of state law. The Carr class additionally alleged, *inter alia*, violations of the Sherman Anti-Trust Act under 15 U.S.C.A. §§ 1 & 2, the Public Utility Holding Company Act of 1935 under 15 U.S.C.A. § 79 *et seq.*, the Georgia RICO Act under Ga.Code Ann. §§ 16-14-1 *et seq.*, and civil rights violations under 42 U.S.C.A. §§ 1983 & 1985.

The defendants in both cases filed motions to dismiss. The motion was granted against the Taffet class on January 5, 1990, on the grounds that the clear statement doctrine, abstention, the primary jurisdiction doctrine, and the filed rate doctrine barred the complaint. The motion was granted against the Carr class on March 1, 1990, on the same grounds. 731 F.Supp. 1067 (S.D.Ga.). Both classes now appeal, requiring us to consider each of these grounds of dismissal. The defendants also raise the question of whether the plaintiffs have stated a claim under RICO, asserting that the plaintiffs have suffered no cognizable injury. We address each issue in turn.

II. DISCUSSION

[1] Dismissal, as a question of law, is subject to plenary review by the appellate court. *See Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577, 1578 (11th Cir. 1985). In reviewing the district court's dismissal of the plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6), this Court must read the facts alleged in the complaint in the light most favorable to the plaintiffs and may affirm only if " 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S.S 229, 109 S.Ct. 2893, 2906, 106 L.Ed.2d 195 (1989) (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)).

A. *The Clear Statement Doctrine*

[2] Both district courts ground their dismissals of the plaintiffs' RICO claims on the "clear statement doctrine." This doctrine of statutory construction counsels that a federal court should not apply a federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area.[3] *See, e.g., McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 2881-82, 97 L.Ed.2d 292 (1987) (declining to apply a federal mail fraud statute in such a way that it might allow the federal government to set "standards of disclosure and good government for local and state officials" in the absence of clear and definite language that this was the intent of Congress). Courts, through the application of this doctrine, thus

[3]*See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.").

"remand" statutes to the legislative body for clarification, thereby requiring that Congress express its will deliberately and unambiguously on issues it perhaps could not have foreseen at time the statute was originally enacted. The rationale for this approach to statutory construction lies in the admonition that "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866, 104 S.Ct. 2778, 2793, 81 L.Ed.2d 694 (1984). Congress, however, may possess neither the resources nor the will to address every issue so "remanded" to it by the courts. *See, e.g., Potomac Elec. Power Co. v. Director, Office of Workers Compensation Programs*, 449 U.S. 268, 284, 101 S.Ct. 509, 517, 66 L.Ed.2d 446 (1980) (noting the difficulty posed in continuing judicial interpretation of a statute which Congress had not chosen to reexamine in more than half a century). Moreover, the literalism which this approach engenders can lead to unnecessarily harsh results. *See, e.g., Mohasco Corp. v. Silver*, 447 U.S. 807, 828, 100 S.Ct. 2486, 2498, 65 L.Ed.2d 532 (1980) (Blackmun, J., dissenting) (noting that inequitable results come about when the court closes its eyes to alternative interpretations of statutes through "a strong-armed invocation of the plain-meaning rule"). Thus, though the "clear statement doctrine" wisely counsels us to be cautious in exercising federal judicial authority in an area of state concern, we must also take care not to frustrate the intent of Congress where it can reasonably be discerned.

The *Taffet* district court opinion only briefly mentioned this doctrine, citing *McNally* and stating simply that there is nothing in the language of RICO which specifically indicates that Congress intended RICO to apply to utilities. The *Carr* district court, however, discussed the doctrine more extensively through its explanation of *County of Suffolk v. Long Island*

Lighting Co. (LILCO), 710 F.Supp 1387 (E.D.N.Y.1989), *aff'd in part, rev'd in part*, 907 F.2d 1295 (2d Cir.1990), a case holding RICO inapplicable to an electric company.

[3] Application of the doctrine to the cases at bar begins with the assumption that ratemaking is traditionally a function of state agencies. Even though the plaintiffs are not asking the federal courts to invade the province of the state PSCs by setting the rates for electricity, the district courts reasoned that in order to award the ratepayers/plaintiffs damages they would have to figure out what the correct rate would have been had the defendants not defrauded the state PSCs. The district courts saw this as an infringement upon the state PSCs' traditional realm of control. Therefore, the district courts refused to apply RICO because the statute does not clearly state that it applies to utilities.

As the Second Circuit recently stated, however, in disagreeing with the district court in *LILCO*, the more basic rule of construction is that a court should never " 'pursue the theory of the dog that did not bark.' " *County of Suffolk v. Long Island Lighting Co. (LILCO)*, 907 F.2d 1295, 1306 (2d Cir.1990) (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592, 100 S.Ct. 1889, 1897, 64 L.Ed.2d 525 (1980)). In other words, a court should not require "Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." *Id.* As the Second Circuit further pointed out, the Supreme Court has found the clear statement doctrine useful only where the statute was ambiguous on its face or where an application of the doctrine would suggest an interpretation of a statute which would be ***in accord with*** the statute's facial language and legislative history. *Id.* at 1306-07. RICO, on the other hand, is totally unambiguous on its face. *Id.* at 1308. The statute prohibits "any person" from violating its proscriptions. *See id.* at 1305; 18 U.S.C.A. § 1962. The

statute then defines "person" as "any individual or entity capable of holding a legal or beneficial interest in property." *See id.;* 18 U.S.C.A. § 1961(3). Therefore, because a utility is a legal entity which can hold property, RICO should apply to utilities. *Id.* at 1308.

Moreover, Congress has explicitly stated that RICO should be "liberally construed to effectuate its remedial purposes." Pub.L. No. 91-452, §904(a), 84 Stat. 947 (1970). Those remedial purposes, according to the Supreme Court, are most evident in private causes of action brought by those injured as a result of racketeering. *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 498, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985). The district courts in the cases at bar, consequently, have made an unwarranted expansion of the clear statement doctrine. We therefore find the doctrine inapplicable in the instant cases.

B. ***Burford*** *Abstention*

Both the *Taffett* and Carr district courts also dismissed the plaintiffs' claims on the grounds of abstention. The *Taffet* court abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The *Carr* court distinguished the more recent case of *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans (NOPSI)*, 491, U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), which held that neither *Burford* nor *Younger* abstention applied to a case in which a utility sued a local ratemaking body in federal court. By implication, then, the *Carr* court also abstained under *Burford*.

[4] In *NOPSI*, the Supreme Court distilled the "*Burford* doctrine" by explaining that where adequate state court review is available a federal court sitting in equity should abstain from interfering with proceedings of state administrative agencies:

"(1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *NOPSI*, 109 S.Ct. at 2514 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)).[4] The Court went on to emphasize that "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *Id.* (quoting *Colorado*, 424 U.S. at 815-16, 96 S.Ct. at 1245-46).

[5] Under this test, it is clear that the claims should not be dismissed on the ground of *Burford* abstention. First, both actions primarily involve federal questions rather than state-law questions. These are essentially RICO actions with various pendent state-law fraud claims. Under Supreme Court precedent, the presence of a federal basis for jurisdiction raises the level of justification needed for the court to abstain under *Burford*. *Colorado*, 424 U.S. at 815 n. 21, 96 S.Ct. at 1245 n. 21; *see also LILCO*, 907 F.2d at 1308 (holding that the district court could not abstain under *Burford* where all claims were federal). Moreover, in examining the state versus federal

[4] As a preliminary issue, plaintiffs argue that *Burford* cannot apply because the district courts are not here sitting in equity. Though abstention rulings premised upon principles of comity and federalism were originally developed in the context of actions seeking equitable relief, those principles have also been applied to actions seeking monetary damages. *See, e.g., Fair Assessment In Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107-116, 102 S.Ct. 177, 181-86, 70 L.Ed.2d. 271 (1981) (holding that comity barred taxpayers' action under § 1983 for damages against state tax officials). This argument, consequently, is meritless.

interest in *LILCO*, the Second Circuit found the fact that RICO offered treble damages and attorneys' fees, which the plaintiffs could not be awarded in any proceeding before the state PSC, demonstrated the gravity of the federal interest in the case. *LILCO*, 907 F.2d at 1309. The plaintiffs in the cases at bar likewise contend that they have no damages remedy before their state PSCs. Though the PSCs can set rates prospectively, they cannot set rates retroactively or award damages.[5]

The issue of damages also demonstrates that the second prong of the *Burford* doctrine as enunciated in *NOPSI* does not apply in this case. That is, the federal court's award of damages will not cause disruption to the state's attempt to establish a coherent policy. The plaintiffs have requested treble damages. In order to determine the actual damages suffered, the district courts would have to determine what the rate would have been for the years in question had the utilities not defrauded the PSCs. This complex calculation would require an application of the appropriate accounting systems and various formulas the PSCs used to arrive at the allowable profit for the utility. The defendants complain that such a calculation would require that the district courts invade the province of the PSCs and cause disruption to state regulation

[5]The defendants do not refute the plaintiffs' assertion that the PSCs cannot award damages. The PSCs function prospectively rather than retroactively. *See* Ala.Code § 37-1-97 (1975); Ga.Code Ann. § 46-2-25 (1982). In spite of this fact, the defendants argue that the district courts should not hear this matter because the plaintiffs have not complained to the PSCs and therefore have not exhausted their administrative remedies. At oral argument, the defendants asserted that even though the state PSCs could not award damages, if complained to they might be able to concoct some civil remedy to redress the plaintiffs' injuries. The defendants, however, have not articulated what this remedy might be. Under this Court's precedent, exhaustion is not required "when the administrative remedy is inadequate . . . or would not provide relief commensurate with the claim." *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1556 (11th Cir.1985). Because the PSCs can provide no retroactive relief or damages commensurate with the plaintiffs' claims, exhaustion of administrative remedies is not necessary.

by choosing among various accounting systems, a choice which the defendants assert the PSCs have not already made. But this argument ignores the fact that this is an appeal from the district courts' grants of Rule 12(b)(6) motions. The plaintiffs have alleged in their complaint that the proper accounting system to use has been pre-established by IRS regulations. *See Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984) (stating that the decision to dismiss on Rule 12(b)(6) must be made on the basis of the allegations made on the face of the complaint), *aff'd* 764 F.2d 1400 (11th Cir.1984), *cert. denied*, 476 U.S. 1124, 106 S.Ct. 1992, 90 L.Ed.2d 673 (1986). Thus, based on the allegations contained in the complaint, the calculation of damages does not necessarily cause the district courts to make policy choices which might disrupt the state regulatory scheme or usurp the position of the state PSC as ratemaker. The district courts would only have to apply a set of pre-established decisions and procedures to arrive at an estimation of what a prior rate would have been in the absence of fraud. Because the court would not be passing judgment upon a decision of the PSC or acting within the area of prospective ratemaking, there would be no disruption of state policy. *Burford*, therefore, does not apply to the cases at bar.

C. *Primary Jurisdiction Doctrine*

[6] The *Taffet* and *Carr* courts also based their dcisions to dismiss the cases on the primary jurisdiction doctrine, citing *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 63, 77 S.Ct. 161, 164, 1 L.Ed.2d 126 (1956). *Western Pacific* held that whenever "enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

Id. at 64, 77 S.Ct. at 165. The rationales for this doctrine are that (1) the agency has a superior expertise in the area in question, and (2) there is a need for uniformity in interpretation of a statute or regulation on a subject with which Congress has entrusted an agency. *Id.*

[7-9] First, though the state PSCs clearly have expertise in ratemaking, the essential issue in this case is not what a reasonable rate would be. Rather, the issue is whether the utilities committed fraud and violated RICO. The determination of what the rate would have been comes into play only at the point of determining damages.[6] Even at that point, the issue is not what rate would have been reasonable, but what part of the rate which the PSCs previously deemed reasonable was the result of the utilities' fraudulent acts. Second, as the Second Circuit found in *LILCO*, "[t]he uniformity rationale clearly does not support application of the [primary jurisdiction] doctrine in the federal question/state agency context." *LILCO*, 907 F.2d at 11310. In a situation in which an issue has been entrusted to one overarching federal agency, abstention by the federal courts allows that agency to develop uniform policies which in turn produce even-handed, uniform results. But where an issue lies within the domain of agencies created by the various states, uniformity is neither expected nor prized. Moreover, in the situation in which Congress creates a federal agency and entrusts it with a modicum

[6]The determinaton of damages in this case is a complex task. "Although 'speculation and guesswork' should not be the basis for ascertaining damages, . . . damages need not be calculated by mathematical precisions. . . . 'Any other rule would allow a wrongdoer to profit by his wrongdoing at the expense of his victim.' " *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir.1988) (quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946)) (citation omitted). Consequently, the assertion that the case should be barred because the district courts' calculations may not be mathematically precise has no merit.

of adjudicatory power over a subject matter, the agency's creation evinces a congressional intent to limit the judiciary's jurisdiction. However, a state, in creating a state agency, "cannot be said to shed any light on any determinative issue relating to congressional intent." *Id.* Consequently, the examination of the rationale behind the primary jurisdiction doctrine does not support application of the doctrine to the cases at bar. *See Western Pacific,* 352 U.S. at 64, 77 S.Ct. at 165 (stating "[n]o fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation.").

D. *Filed Rate Doctrine*

(10) The "filed rate doctrine," in its most basic form, "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981). The doctrine originally arose out of cases interpreting the Interstate Commerce Act.[7] *See, e.g., Keogh v. Chicago & N.W. Ry. Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). It has since, however, been applied to a variety of regulated industries. *Arkansas,* 453 U.S. at 577, 101 S.Ct. at 2930; *Maislin,* 110 S.Ct. at 2775 n. 9 (Stevens, J., dissenting). The purpose of the doctrine is (1) to preserve the regulating agency's authority to determine the reasonableness of rates and (2) to insure that

[7]In *Maislin Indus., Inc. v. Primary Steel, Inc.,* ____ U.S. ____, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990), the Supreme Court reviewed the origins of the doctrine, explaining that the doctrine's rigid approach was necessary to eradicate the practices of shipping clerks in the early twentieth century who intentionally misquoted rates to favored customers as a means of offering special rebates or discounts. *Id.* 110 S.Ct. at 2766.

the regulated entities charge only those rates which the agency has approved or been made aware of, as the law may require. *Arkansas*, 453 U.S. at 577-78, 101 S.Ct. at 2930-31. The uniformity of rates engendered by the doctrine prevents the regulated entities from discriminating among customers and stabilizes rates. *Maislin*, 110 S.Ct. at 2766. In accordance with this uniformity rationale, courts are barred from imposing a rate different from the rate filed with the regulating aency; the agency, moreover, cannot alter a rate retroactively. *Arkansas*, 453 U.S. at 578, 101 S.Ct. at 2930. Thus, courts are also generally considered without authority to award a party what might amount to a "retroactive rate increase based on speculation about what the [regulating agency] might have done had it been faced with the facts." *Id.* at 578-79, 101 S.Ct. at 2931 (disapproving of such an award as damages in a breach of contract case).

The Supreme Court has applied the doctrine even in cases in which one party allegedly defrauded another. *See., e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951) (holding that where two utilities with interlocking directorates reached an agreement as to the rates that they would charge between them and received approval of the regulating agency, the Court had no authority to second-guess the agency's judgment that the rate and arrangement were reasonable even though one utility had possibly defrauded the other). The Court, however, has never applied the doctrine when faced with a claim that a fraud has been committed upon the agency itself. *See H.J., Inc.*, 109 S.Ct. at 2898 n. 1 (declining to address whether the filed rate doctrine barred a RICO claim alleging that telephone utility bribed officials in state agency to get higher rates); *Arkansas*, 453 U.S. at 583 n. 13, 101 S.Ct. at 2933 n. 13 ("We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct.");

Southern Union Co. v. Federal Energy Regulatory Comm'n, 857 F.2d 812, 818 (D.C. Cir. 1988) (recognizing that the *Arkansas* case opened the door to an equitable exception to the filed rate doctrine in cases of fraudulent conduct), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1118, 107 L.Ed.2d 1025 (1990).

The plaintiffs argue that Eleventh Circuit precedent has rejected application of the filed rate doctrine in a situation in which a fraud before the regulating agency threatened to undermine the integrity of the regulatory process. In *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir.1971), *cert denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), the parties were owners of gas producing wells located in the same field. A state agency determined how much gas each owner would be allowed to produce each month based on reports and projections submitted to the agency by the producers. The plaintiffs alleged that the defendants had conspired to subvert the agency's allotment process by submitting false reports and projections. The court held that the plaintiffs could bring an antitrust action against the defendants based on these attempts to subvert the functioning of the regulatory scheme. *Id.* at 1303. However, because the *Woods* court did not specifically consider the filed rate doctrine, its precedential value on the filed rate issue is questionable.

[11,12] Because of the paucity of case law on this issue,[8]

[8]The only reported case which addresses the filed rate doctrine specifically in the RICO context is *H.J., Inc. v. Northwestern Bell Tel. Co.*, 734 F.Supp. 879 (D.Minn. 1990). This case went to the Supreme Court on the issue of what constitutes a "pattern" of racketeering for RICO purposes. The Supreme Court did not reach the filed rate issue. *H.J., Inc.*, 109 S.Ct. at 2898 n. 1. On remand, the district court found the suit barred by the filed rate doctrine. The state PSC had prior to remand by the Supreme Court recalculated the rate in question for puroses of a pending

the best route is to revisit the policy behind the doctrine. As articulated in *Arkansas* and *Maislin, supra*, that policy is to preserve the regulating agency's authority over the setting of reasonable rates. Properly set rates then result in stabilization and uniformity and prevent discrimination among customers. The plaintiffs have alleged that the defendants actively worked to subvert the rate-setting process. The possibility of a RICO action against a utility which defrauds its state PSC creates great incentive for that utility to present its PSC with accurate and truthful information upon which the PSC may base its rate decisions. With the integrity of the regulatory process thus fortified, the rates set by the PSCs would be more stable and could be better trusted to prevent discrimination among customers. Consequently, permitting an action for damages under RICO against the perpetrator of the fraud would enhance rather than infringe upon the PSCs' authority to set reasonable and uniform rates. Therefore, application of the filed rate doctrine in the cases at bar is not appropriate.

E. *The Claim for Relief Under RICO*

[13] The defendants assert that plaintiffs have not stated a claim under RICO because they have not alleged a legally cognizable injury and have not alleged sufficient predicate acts.

Section 1964(c) of RICO requires that the plaintiff be injured in his business or property. The defendants point out that the Supreme Court looks to the Clayton Act, upon which

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state investigation. This recalculation eradicated the need for the federal court to become involved in the complex calculations required to arrive at a figure for damages. The district court, however, feared that even the availability of RICO treble damages might impermissibly influence the manner in which the state PSC set rates. *H.J., Inc.*, 734 F.Supp. at 886. Thus, relying on the district court opinion in *LILCO* (since disagreed with by the Second Circuit) and the district court opinion in *Carr* (here under review), the *H.J.* district court on remand dismissed the case.

RICO was modeled, as an interpretive aid. *Sedima*, 473 U.S. at 486-90, 105 S.Ct. at 3279-82. The Court, in upholding an application of the filed rate doctrine in the antitrust area, has stated that an antitrust plaintiff has no legal right to a tariff other than that filed with the Interstate Commerce Commission ("ICC"); the plaintiff therefore does not allege an antitrust injury merely by alleging that the rate approved by the ICC resulted from a rate-setting conspiracy. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 416, 106 S.Ct. 1922, 1926, 90 L.Ed.2d 413 (1986). By analogy, then, defendants argue that plaintiffs in the instant cases have alleged no cognizable RICO injury in claiming that the rate charged by the utilities resulted from fraud.

This argument has merit only if one accepts the defendants' argument that the filed rate doctrine should apply to this case. In *Square D*, the ICC did not set the tariffs but merely published them. *Id.* at 413, 106 S.Ct. at 1925. The ICC was neither given false information nor defrauded. Rather, the basis of the claim in *Square D* was that a group of motor carriers had conspired together in setting the rates which they subsequently filed with the ICC. In this situation, the Court found that the legal tariff was that filed with the ICC regardless of the allegations of conspiracy. Therefore, under the filed rate doctrine, the plaintiff had no cognizable right to pay a tariff other than the one filed. Because the filed rate doctrine does not apply to a situation, such as that presented in the cases at bar, in which the defendants have fraudulently subverted the ratemaking process itself by presenting the agency with false information, the rate which resulted from fraud cannot be said to be the legal one. Moreover, the plaintiffs cannot be said to have no cognizable right to pay anything but the fraud-induced rate. The cognizable injury is therefore money lost as a result of fraud upon the state agency. Money lost by customers as a result of antitrust violations is generally considered an injury

to "business or property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979). By analogy to antitrust law, then, the plaintiffs' injury is cognizable under RICO.

To state a claim under RICO, the plaintiffs must allege that the defendants engaged in racketeering activity which is defined under § 1961(1) of RICO to mean specified predicate acts, including mail fraud and wire fraud. The plaintiffs in both cases at bar have alleged use of the mail to perpetrate the fraud. The defendants, however, claim that this allegation is insufficient because they believe the plaintiffs claim only deprivation of intangible, non-cognizable rights to reasonable rates and fraud-free PSC proceedings. They argue that neither of these intangible rights supports a prosecution for mail fraud. To prove mail fraud, they argue, the plaintiffs must show deprivation of tangible property or money. This argument has merit only if one accepts defendants' argument that plaintiffs have not sustained a tangible, cognizable injury under RICO. As discussed above, however, we reject the application of the filed rate doctrine to the facts alleged in the instant cases and find that the plaintiffs have alleged a tangible, cognizable RICO injury. Accordingly, the injury alleged, loss of money, may serve as the basis for a mail fraud prosecution which is in turn a predicate act under RICO.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district courts' dismissals of the plaintiffs' claims in both *Taffet* and *Carr* and REMAND for trials on the merits.

BIRCH,Circuit Judge, dissenting:

For the reasons that follow, I respectfully dissent. I would affirm the district courts' decisions to dismiss the plaintiffs' RICO claims. I believe that the primary jurisdiction doctrine and the filed rate doctrine, discussed in parts II(B) and (C) of the majority opinion, prohibit application of the RICO statute to public utilities after a rate has been approved by the state PSC. The majority relies upon the Second Circuit's recent decision in *County of Suffolk v. Long Island Lighting Co. (LILCO)*, 907 F.2d 1295 (2d Cir.1990), but that opinion did not explicitly consider the filed rate doctrine. Moreover, to the extent that the *LILCO* decision may have dealt with the filed rate doctrine by implication, I believe that the Second Circuit has created an unwarranted and unprecedented exception to the existing law on this subject.

APPENDIX III

FILED
U.S. DIST COURT
AUGUSTA DIV.
MAR 14 '90
CLERK, B McCARTHY
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CIVIL ACTION CV189-118

FREDERICK RODGERS CARR, CARR SALES COMPANY, and O.E.M. PRODUCTS, INC. TIMOTHY DUNN STOKELY, CLARK STOKELY, III and ALL OTHER SIMILARLY SITUATED,

Plaintiffs

v.

THE SOUTHERN COMPANY, SOUTHERN COMPANY SERVICES, INC., GEORGIA POWER COMPANY, and ARTHUR ANDERSEN & CO.,

Defendants

O R D E R

Plaintiffs are residents of Georgia and seek to represent a class of ratepayers for electrical power within the state. They bring this suit against the electric utility defendants as well as Arthur Andersen & Co., the certified public accountant for the utility defendants. Plaintiffs allege that defendants, through their accounting methods, inflated maintenance costs submitted to the Public Service Commission (PSC) by expensing maintenance and emergency spare parts in the year purchased when in fact the spare parts were not used, if at all, until subsequent years. Plaintiffs maintain that generally accepted accounting principles endorsed by the PSC require defendants

to expense the maintenance spare parts in the year that they are used, instead of the year in which they are acquired, and that the emergency spare parts are to be capitalized over the life of the defendants' power plants.

Plaintiffs allege that defendants committed fraud by employing these accounting methods to obtain rate increases from the PSC. The alleged fraudulent scheme has been in existence since at least 1975 and has resulted in over 60 million dollars of improper rate increases. Plaintiffs have submitted documentation which shows that as of December 31, 1985, Georgia Power Company had on hand in inventory $117,904,014.00 worth of spare parts which have already been expensed with PSC approval. According to plaintiffs, defendants' scheme was discovered only after an accountant for Georgia Power agreed to go "undercover" for the IRS in connection with an unrelated tax investigation.

Plaintiffs' initial complaint contained only four counts which all alleged violations of the Federal Civil Racketeering Statute (RICO). Subsequently, plaintiffs' amended their complaint which now consist of 13 counts: the four RICO counts plus nine new counts for the alleged violations of the Sherman Antitrust Act, the Public Utility Holding Company Act, 42 U.S.C. §§ 1983 and 1985, the Federal Power Act, and pendent state law causes of action. Defendants have moved the Court to dismiss each and every claim in plaintiffs' amended complaint. As grounds for their motion defendants offer three predominant and interrelated arguments: (1) the plaintiffs have not presented a justiciable case or controversy because they seek "judicial ratemaking", relief which the federal courts lack the power to grant, (2) the Court should abstain from addressing the plaintiffs' claims to avoid needless conflict with state policies and disruption of the State of Georgia's regulation of public utilities, and (3) the plaintiffs' failure to exhaust ad-

ministrative remedies causes essential elements of their claims to be lacking. Before addressing plaintiffs' claims within the context of defendants' motions to dismiss, it is important to first highlight Georgia law with respect to the PSC's regulation of public utilities.

In Georgia, electric utilities are required to file their rate schedules with the PSC pursuant to O.C.G.A. § 46-2-25(a). The PSC has "exclusive power to determine what are just and reasonable rates." O.C.G.A. § 46-2-23(a). Electric utility companies are required to charge no more than the current filed rate. O.C.G.A. § 46-2-25(a).

The Georgia Supreme Court has stated that "[w]hat is a 'just and reasonable rate' is basically a matter of policy. It involves an intelligent estimate of present and probable future values and is at best an approximation." *Georgia Power Co. v. Allied Chemical Corp.*, 233 Ga. 558, 559 (1975). "[W]hen the commission establishes a rate, such act is legislative in character, and binds all parties concerned in the same manner as if the rate had been fixed by an act of the General Assembly." *Georgia Public Service Commission v. Atlanta Gas Light Co.*, 205 Ga. 863, 883 (1949). The commission's authority to regulate rates is prospective only, and the commission does not have the power to determine that rates charged pursuant to a filed schedule were unreasonable and award reparations. *Georgia Public Service Commission v. Atlanta Gas Light Co.*, 205 Ga. at 888.

Judicial review of the Commission's decisions may be obtained by petitioning the Superior Court of Fulton County. O.C.G.A. § 50-13-19(b). However, the courts lack jurisdiction to consider any exceptions to a decision of the commission that were not first raised before the commission. O.C.G.A. § 50-13-19(c). In reviewing rates fixed by the commission, the court cannot establish any particular rate as being

"just and reasonable", since this function is exclusively delegated to the commission. *Southern Bell T. & T. Co. v. Georgia Public Service Commission*, 203 Ga. 832, 870 (1948). Georgia does not permit collateral attacks on the reasonableness of rates filed with the commission. *Norman v. United Cities Gas Co.*, 231 Ga. 788 (1974). Neither side contests these issues of Georgia public utility law. Having reviewed the parties extensive "briefs" and having heard their excellent oral arguments during the hearing of February 13, 1990, I now address defendants' motions to dismiss.

Defendants' arguments in support of their motions to dismiss, as heretofore enumerated, are not limited to any particular federal claim, but, rather, are made with respect to all of plaintiffs' federal claims. Plaintiffs rely upon the federal RICO statute as the basis for the Court's jurisidiction to hear their claims. Indeed, a federal civil RICO case appears to be the most apt vehicular means to attain federal jurisdiction. Consequently, the discussion may focus most significantly upon the federal civil RICO claims with the understanding that much of what is said is also applicable to the other federal claims.

In response to the defendants' contention that plaintiffs are attempting to involve the Court in judicial ratemaking of a public utility, plaintiffs argue that the amount of monetary damages that they are seeking can be measured to a mathematical certainty. Plaintiffs maintain that they are not challenging the PSC's determination of what constitutes just and reasonable electric rates. Rather, plaintiffs argue that they are seeking a specific and provable amount of damages resulting from the alleged fraudulent accounting practices of defendants. Defendants rebut this argument by stating that, in essence, plaintiffs are seeking the difference between the rate approved by the PSC and the rate which would have been approved if the PSC was not defrauded by the defendants. Defendants con-

tend that it is inconsistent for plaintiffs to claim that they are seeking relief in the amount of the inflated rates, approved by the PSC, caused by defendants fraudulent accounting practices and at the same time deny that they are challenging the reasonableness of the rates set by the PSC. Plaintiffs never argue that they were charged a rate that differed from the one approved by the PSC. Nor, do they argue that the PSC itself was involved in any wrongdoing.

Defendants contend that Congress, by enacting civil RICO, did not authorize federal courts to engage in state utility ratemaking. In support of their argument, defendants offer *County of Suffolk v. Long Island Lighting Co.*. 710 F.Supp. 1387 (E.D.N.Y. 1989) (*LILCO*), which appears to be one of only two federal cases — the other case is *M.R. Taffet v. The Southern Company*, 89V-712-N, M.D. Ala., January 5, 1990 — dealing with RICO claims involving a state's utility ratemaking authority. In *LILCO*, the county brought suit against a utility company under civil RICO, alleging that defendants had lied to the New York public service commission in order to obtain higher rates needed to build nuclear power plants. The jury returned a verdict in plaintiff's favor which after being trebled totaled $22.9 million. Expressing grave misgivings about having allowed the case to proceed to the jury, Judge Weinstein granted defendant's motion for judgment notwithstanding the verdict. After finding that evidnce was not insufficient to support the jury's finding that all elements of plaintiff's RICO had been established, Judge Weinstein enumerated four primary reasons for his holding: primary jurisdiction, abstention, "our federalism", and the doctrine of clear statement. Also significant is Judge Weinstein's observation that

> [w]hat the trial proved almost beyond peradventure was that RICO cannot, and should not, be applied in a case such as this to permit a federal jury in a civil case to second guess the ratemaking authority of

> the state. In effect, the jury was asked to retroactively reset the electric rates previously fixed by the PSC with its staff of hundreds of technicians working in such arcane fields as utility ratemaking, marketing of utility securities, taxation, economics, generating plant construction, and power grids.

County of Suffolk v. Long Island Lighting Co., 710 F.Supp. at 1393.

Plaintiffs attempt to distinguish the instant case from *LILCO* by proposing that the result reached in that case would have be different if, as in the instant case, fraud had been involved. However, Judge Weinstein stated "[t]his court recognized in its charge, which is the law of the case, that to say that a fraud was successfully committed against the PSC resulting in damages is, for practical purposes, to retroactively reduce electric rates." *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. at 1396. In addition, in *M.R. Taffet v. The Southern Company*, 89V-712-N, M.D. Ala., January 5, 1990, p. 3, the court stated the following:

> While Plaintiffs' claims are based on alleged fraud, it is clear that the remedy required from this Court would constitute rate-making. Plaintiffs seek to recover the amount allegedly in excess of rates under a proper accounting method. This would require the Court to determine a "proper" rate. This new rate would apply to a likely large class of Plaintiffs. Defendants would also likely be forced to accept the Court's rate in the future to avoid further liability.[1]

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[1]The factual allegations in the Alabama federal district court case appear to be almost identical to those in the instant case. However, the Alabama case only involved RICO and state law fraud claims. Judge Varner granted defendants' motion to dismiss on grounds similar to those discussed in *LILCO*.

Therefore, I cannot endorse the plaintiffs' arguments that both the *LILCO* and the *Taffet* cases would have been decided differently if fraud was involved. Likewise, it is difficult for me to comprehend how the relief requested by the instant case plaintiffs will not necessarily involve the Court in judicial ratemaking. Plaintiffs are challenging the accounting methods used by a public utility, an area of concern which has traditionally been recognized as belonging to the PSC. Therefore, I must echo the reservations, discussed above, of the two district court judges who have previously dealt with this issue.

Consequently, the query for the Court now becomes whether to follow the doctrines and precedents as interpreted by the *LILCO* and *Taffet* courts or chart a new course by distinguishing them. In support of their RICO claims, plaintiffs' rely upon the recent United States Supreme Court case of *H.J. Inc. v. Northwestern Bell Telephone Co.*, ____ U.S. ____, 109 S.Ct. 2893 (1989). In that case, customers of a telephone company brought a class action, alleging that the company gave bribes to members of the Minnesota Public Utilities Commission with the objective of causing the commissioners to approve unfair and unreasonable rates. The district court dismissed the case holding that plaintiffs had not established that the defendants had engaged in a "pattern of racketeering activity" as required under the RICO statute. The court of appeals affirmed. The Supreme Court expressly stated that it granted certiorari to resolve the conflict between circuits over whether " '[a] single fraudulent effort or scheme is insufficient' to establish a pattern of racketeering activity." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. at 2898 (citations omitted). The Supreme Court was not faced with the issues which confront us in the instant case, namely questions of abstention and federalism. Thus, *H.J., Inc.* is inapposite to the defendants' arguments in our particular case.

Next, plaintiffs argue that federal case law generally has held that the RICO statute should be construed broadly, and that it is not the job of federal courts to limit its application. *Sedima v. Imrex Co.*, 473 U.S. 479, 497-98 (1985). The RICO statute itself lends credence to plaintiffs' argument by including within its predicate acts conduct which has traditionally been of state and not federal concern. See 18 U.S.C. § 1961(1). However, plaintiffs do not cite to any case which broadly construes RICO in the context of a state agency's exclusive authority to regulate rates charged by a public utility. Furthermore, the primary jurisdiction doctrine proscribes that an agency, rather than a court, handle issues requiring special expertise. *United States v. Western Pacific RR Co.*, 352 U.S. 59, 63 (1956).

Finally, plaintiffs argue that application of the civil RICO statute in this case will not violate principles of federalism nor abstention. Plaintiffs rely on *New Orleans Public Service, Inc. v. Council of City of New Orleans*, (NOPSI) ____ U.S. ____, 109 S.Ct. 2506 (1989), for the proposition that the doctrine of federal abstention does not apply where the PSC has made its final decision.[2] Plaintiffs allege that under Georgia law, the PSC lacks authority to correct the past wrongful conduct of defendants and that there is no interference with the PSC's expertise since it is powerless to act. However, in *NOPSI*, the question was one of federal preemption by the FERC over the state ratemaking body with respect to interstate wholesale power transactions. The Supreme Court reasoned that:

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[2]In *New Orleans Public Service, Inc.*, the Federal Regulatory Energy Commission (FERC), acting pursuant to its exclusive regulatory authority over interstate wholesale power transactions, allocated the costs of a nuclear reactor among several utility companies which made up an interstate power pool. One of these power companies, NOPSI, sought a rate increase from the New Orleans city council, the ratemaking body, to cover the costs allocated to it by the FERC. When the city council failed to grant the rate increase, NOPSI brought this federal suit.

> [u]nlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state law factors, federal adjudication of this sort or preemption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem".

New Orleans Public Service, Inc. v. Council of City of New Orleans, 109 S.Ct. at 2514-15 (quoting Alabama Pub. Serv. Comm'n v. Southern R. Co., 341 U.S. 341, 347 (1951)). The *NOPSI* Court also found that the orders of the state commission were invalid on their face; therefore, no inquiry beyond the orders themselves would be necessary to resolve the preemption dispute. *Id.* at 2515. In addition the Supreme Court reaffirmed the *Burford*[3] abstention test by stating

> [b]ut since, as the facts of this case amply demonstrate, wholesale electricity is not bought and sold within a predominantly local market, it does not demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies. The principles underlying Burford are therefore not implicated.

Id. at 2515.

Plaintiffs have made a valiant attempt to analogize the instant case facts to those found in the *NOPSI* case. However, I conclude that the relief requested by plaintiffs would require the Court to go beyond the face of the PSC's order. The Court would necessarily be required to delve into questions concern-

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[3]In *Burford v. Sun Oil Co.*,d 319 U.S. 315 (1943), the Supreme Court affirmed an order of the district court dismissing a complaint of Sun Oil Company in a suit against the Railroad Commission of Texas to enjoin the execution of an order of the Commission which permitted the drilling and operation of certain oil fields in East Texas.

ing local regulatory facts and problems. Moreover, it is difficult to think of a greater local concern than a state's regulation of a public utility's retail sale of intrastate electricity. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the states." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Com.*, 461 U.S. 375, 377 (1983). The clear statement doctrine prevents intrusion of federal statutes into areas of traditional state concern unless Congress clearly indicates otherwise. *McNally v. United States*, 483 U.S. 350, 360 (1987).

The fact that the state of Georgia has made a conscious decision to preclude the PSC from making reparations for past fraudulently obtained electric rates does not automatically entitle plaintiffs to a federal forum. Plaintiffs, as previously discussed, are afforded some administrative types of relief, which they concede have not been exhausted. These forms of relief may not be the type which they desire; however, as stated, in another context, by Justice Blackmun "[t]he propriety of abstention should not depend on the State's choice to vindicate its interests by a less drastic, and perhaps more lenient route." *Trainor v. Hernandez*, 431 U.S. 434, 449-50 (1977). Moreover, plaintiffs have failed to point to a significant federal interest which would justify the Court's intervention.

In further support of their motions to dismiss, defendants point to the filed rate doctrine which prohibits courts from altering rates filed and approved by administrative agencies. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). In *Montana-Dakota*, petitioner's predecessor and respondent, both public utility electric companies, had formed interlocking directorates, with the approval of the Federal Power Commission, whereby they shared ex-

penses and made a number of contracts between the two companies establishing rates and charges which were filed with and accepted by the Commission. Petitioner's complaint alleged that the interlocking directorship was used fraudulently to deprive it of its federally conferred right to reasonable rates and charges, and demanded reparations. In holding that petitioner had not established a cause of action, the Supreme Court stated "[t]o reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. at 251. In addition the Court reasoned that "the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce." *Id.*

In the instant case, plaintiffs argue that in reaching its conclusion, the *Montana-Dakota* Court recognized a common law cause of action for fraud and deceit but dismissed the case for lack of diversity jurisdiction. *Id.* at 250. Moreover, plaintiffs contend that the expanded jurisdiction of the federal Civil RICO statute enables this Court to make reparations for the alleged commission of fraud in the instant case. As discussed previously, I cannot find that the RICO statute authorizes such a drastic intervention into a state's authority to regulate public utilities. In addition, the *Montana-Dakota* Court concluded by stating "[h]ere the issue of reasonableness of the charges is not one clearly severable from the issues of liability, for the acts charged do not amount to fraud unless there has been an unreasonable charge." *Id.* at 253-54. Therefore, if the Court were to allow the instant case to proceed, it would necessarily become engrossed in exclusively local concerns, namely determining what is a just and reasonable rate for retail, intrastate electricity as defined by Georgia law.

In this case, the plaintiff's allegations, which must be taken

as true for motion purposes, are of stunning proportions. Fraud at that highest corporate level and damages in the scores of millions of dollars are assertions of utmost gravity. Such grist is most appropriate for the machinery of justice which turns inexorably and grinds exceeding fine. The public interest could scarcely be better served than to expose these allegations to the cold light of litigation so that they could be substantiated or disproved. Naturally, I am concerned that a wrong could exist without a remedy; but, I have greater concern and higher regard tor the principles of federalism which underlie my decision herein.

It is lamentable that allegations of the sort raised in this case cannot be fully aired by trial in a court of law, the method ordained by our system to reach justice. However, this federal district court is one of limited jurisidiction which cannot and should not be invoked to frustrate the proper regulatory purposes of the soverign State of Georgia. As Justice Bleckley observed in closing an eloquent opinion, "the law cannot prevent injustice in every instance. Would that it could." *Early & Lane v. Oliver & Norton,* 63 Ga. 12, 22 (1879).

Accordingly, defendants' motions to dismiss are GRANTED with respect to all of the plaintiffs' federal claims. Due to the pendent nature of the state law claims, the Court lacks subject matter jurisdiction to consider them.

ORDER ENTERED at Augusta, Georgia, this 1st day of March, 1990.

Dudley H. Bowen Jr.

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

CASE NUMBER: CV189-118

FREDERICK RODGERS CARR, CARR SALES COMPANY, and O.E.M. PRODUCTS, INC., TIMOTHY DUNN STOKELY, CLARK STOKELY, III and ALL OTHERS SIMILARLY SITUATED

v.

THE SOUTHERN COMPANY, SOUTHERN COMPANY SERVICES, INC., GEORGIA POWER CO., and ARTHUR ANDERSEN & CO.

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Order of this Court of March 1, 1990, this case is DISMISSED.

Date: March 1, 1990

HENRY R. CRUMLEY, JR.
Clerk

Brenda M. McCarthy
(By) Deputy Clerk

APPENDIX IV

RECEIVED
Freeman & Hawkins
JAN 8 1990

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
JAN 5 1990
THOMAS C. CAVER,
CLERK

CIVIL ACTION NO.
89V-712-N

M.R. TAFFET; *ET AL*,

Plaintiffs,

vs.

THE SOUTHERN COMPANY; ET AL,

Defendants.

O R D E R

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendants' Motions to Dismiss filed herein September 18, 1989, be, and the same are hereby, granted and the above-styled cause is hereby dismissed with costs taxed against the Plaintiffs, for which execution may issue.

DONE this 5th day of January, 1990.

R.E. Varner

R.E. VARNER
UNITED STATES DISTRICT JUDGE

FILED
JAN 5 1990
THOMAS C. CAVER,
CLERK

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 89V-712-N

M.R. TAFFET; *ET AL*,

Plaintiffs,

vs.

THE SOUTHERN COMPANY; ET AL,

Defendants.

OPINION

This cause is now before the Court on Defendants' Motions to Dismiss filed herein September 18, 1989, and on the briefs submitted in support of and in opposition thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Plaintiffs filed this action on July 10, 1989, against Defendants for claims under the Racketeer Influenced and Corrupt Organizations Act [RICO] and fraud claims under Alabama law.

FACTS

Plaintiffs allege that Defendants fraudulently obtained increases in rates charged for electricity. The power rates at issue are set by the Alabama Public Service Commission and allow Defendants a fixed guaranteed profit. Whether the permitted profit has been made is determined by offsetting expenses against income. Plaintiffs allege that Defendants fraudulently used accounting practices in which spare parts were treated as expenses rather than as assets, thereby allowing

Defendants to obtain a rate increase. Plaintiffs come before this Court seeking damages based on the rate increase.

LAW

Under Alabama law, the power to set electrical power rates is vested exclusively with the Public Service Commission. CODE OF ALABAMA [1975], § 37-1-31. The Alabama Supreme Court has "expressly rejected any notion that the judicial branch has the authority or duty to set rates." *Alabama Metallurgical v. Alabama Public Service Com.*, 441 So.2d 565, 570 (Ala. 1983). Regulation of utilities has always been the exclusive function of the States. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the states." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Com.* 461 U.S. 375, 377 (1983). The reasons for this are readily apparent. Setting rates is a highly complex and technical task. Rate-making, therefore, requires substantial expertise. Furthermore, uniformity of rates is essential for economic growth of industry and fairness to individual customers.

While Plaintiffs' claims are based on alleged fraud, it is clear that the remedy required from this Court would constitute rate-making. Plaintiffs seek to recover the amount allegedly in excess of rates under a proper accounting method. This would require the Court to determine a "proper" rate. This new rate would apply to a likely large class of Plaintiffs. Defendants would also likely be forced to accept the Court's rate in the future to avoid further liability.

Requiring a federal court to set rates when utiity rate-making power is clearly in the hands of the State calls to mind the Tenth Amendment to the United States Constitution, which states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Federal courts may not be improperly utilized to invade powers belonging to the States. Since rate-making is an exclusive power of the States, this Court finds no judicially enforceable right exists to a rate different from that approved by the Public Service Commission. In support of this conclusion are various legal doctrines.

First, the filed rate doctrine prohibits a filed rate from being altered by a court. *Montana-Dakota Util. Co. v. Northwestern Public Service Com.*, 341 U.S. 246, 250 (1951) [no legal right to a rate other than the filed rate]; *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981) [filed rate doctrine prohibits undermining uniform rate through jury award]; *Square D. Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 411-412, -423-424 (1986) [filed rate doctrine applies even in the face of a willful antitrust violation].

Second, the abstention doctrine provides that courts abstain from exercising federal jurisdiction in a complex administrative process. *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943); *New Orleans Public Service Com. v. Council of New Orleans*, ____ U.S. ____, 109 S.Ct. 2506, 2508 (1989). Clearly, the determination of accurate electrical utility rates involves difficult questions of State law and would interfere with a coherent state policy.

Third, the primary jurisdiction doctrine proscribes that an agency, rather than a court, handle issues requiring special expertise. *United States v. Western Pacific RR Co.*, 352 U.S. 59, 63 (1956). This Court willingly defers to the greater expertise of the State Public Service Commission.

Fourth, the clear statement doctrine prevents intrusion of federal statutes into areas of traditional State concern unless Congress clearly indicates otherwise. *McNally v. United States*, 483 U.S. 350, 360 (1987). Here, Plaintiffs seek to recover under the RICO statute. This Court notes the increasing reluctance of courts to apply RICO so expansively. Nothing in the RICO statutory language or history indicates it should apply to setting intrastate utility rates.

Finally, this Court finds that Plaintiffs' claim fails because Alabama statutory law provides for investigation by the Public Service Commission into the fairness of rates upon a written complaint. CODE OF ALABAMA [1975], § 37-1-83. An adverse decision may be appealed to the Circuit Court of Montgomery County, Alabama, and, thereupon, to the Alabama Supreme Court. CODE OF ALABAMA [1975], §§ 37-1-120, 37-1-132. Interests of comity and ripeness, therefore, mandate that this Court refuse to act upon Plaintiffs' claims. *Alabama Public Service Com. v. Southern R. Co.*, 341 U.S. 341, 349-350 (1951 ["As adequate state court review of an administrative order * * * is available to appellee, intervention of a federal court is not necessary * * *"].

Therefore, it is the opinion of this Court that Defendants' Motions to Dismiss should be granted. An Order will be entered in accordance with this Opinion.

DONE this 5th day of January, 1980.

R.E. Varner

R.E. VARNER
UNITED STATES DISTRICT JUDGE

APPENDIX V

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 10 1992
MIGUEL J. CORTEZ
CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7088

M. R. TAFFETT and ROBERT M. FIERMAN, on behalf of themselves and all of the persons, corporations, municipalities, and other entities, other than the defendants, who are similarly situated,

Plaintiffs-Appellants,

versus

THE SOUTHERN CO., SOUTHERN COMPANY SERVICES, INC., ALABAMA POWER COMPANY and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

No. 90-8452

FREDERICK RODGERS CARR, CARR SALES COMPANY, O.E.M PRODUCTS, INC., TIMOTHY DUNN STOKELY, III and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

versus

THE SOUTHERN COMPANY, SOUTHERN COMPANY SERVICES, INC., GEORGIA POWER COMPANY, and ARTHUR ANDERSEN & CO.,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Alabama and the Southern District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 6, 1991, 11th Cir., 1991, ____ F.2d ____)

(April 10, 1991)

Before TJOFLAT, Chief Judge, FAY, KRAVITCH, HATCHETT, COX, BIRCH and DUBINA, Circuit Judges.*

BY THE COURT:

A member of this court in active service having requested a poll on the applications for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above causes shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

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*Judges R. Lanier Anderson, III and J. L. Edmondson have recused themselves and will not participate.

Senior Judge Frank M. Johnson, Jr., who was a member of the original panel, has elected not to further participate in this matter. *See* 28 U.S.C. § 46(c).

OPPOSITION

BRIEF

FILED
NOV 12 1992
OFFICE OF THE CLERK

No. 92-647

In the Supreme Court of the United States of America

October Term, 1992

M. R. TAFFET, ET AL.

Petitioners,

vs.

THE SOUTHERN COMPANY, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The sole issue presented by this case is the same as that considered by this Court in denying certiorari in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2306 (1992):

> Whether the filed rate doctrine announced in cases such as *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922) and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), applies to claims for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).[1]

The Eleventh Circuit, sitting *en banc* in the cases at bar, set forth the question similarly:

> [W]hether a private suit under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c) (1988), may be brought against a utility to recover for excessive charges for electrical power resulting from the utility's [alleged] fraudulent and material misrepresentations to a state rate-setting commission.[2]

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[1] No. 91-1653; Northwestern Bell Telephone Company's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, at i.

[2] *Taffet v. The Southern Co.*, 967 F.2d 1483, 1485 (11th Cir. 1992) *(en banc)*.

PARTIES TO THE PROCEEDING

Petitioners' statement regarding parties is essentially correct. Additionally, pursuant to Rules 24(b) and 29.1 of the Rules of the Supreme Court of the United States, Respondents state that The Southern Company is the parent corporation of Alabama Power Company, Georgia Power Company, and Southern Company Services, Inc. Moreover, The Southern Company has one non-wholly owned subsidiary, Integrated Communication Systems, Inc.

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No. 92-647

In the Supreme Court of the United States of America

OCTOBER TERM, 1992

M. R. TAFFET, ET AL.

Petitioners,

vs.

THE SOUTHERN COMPANY, ET AL.

Respondents.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents The Southern Company, Southern Company Services, Inc., Georgia Power Company, Alabama Power Company and Arthur Andersen & Co. hereby submit their Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by Petitioners. For the reasons set forth herein, Respondents urge the Court to deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The unanimous *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 967 F.2d 1483 (11th Cir. 1992) and appears as Appendix I to the Petition for

Writ of Certiorari. The vacated panel opinion of the Eleventh Circuit is reported at 930 F.2d 847 (11th Cir. 1991) and appears as Appendix II to the Petition. The Order of the Eleventh Circuit vacating the panel opinion and granting rehearing *en banc* is reported at 958 F.2d 1514 (11th Cir. 1992) and appears as Appendix V to the Petition. The opinion of the United States District Court for the Southern District of Georgia is reported at 731 F. Supp. 1067 (S.D. Ga. 1990) and appears as Appendix III to the Petition. The opinion of the United States District Court for the Middle District of Alabama is reported at 1990 U.S. Dist. Lexis 4189 (M.D. Ala. Jan. 5, 1990) and appears as Appendix IV to the Petition.

STATEMENT OF THE CASE

A. Proceedings and Disposition Below

In the two actions below, Petitioners allege that Respondents Georgia Power Company and Alabama Power Company (the "Utilities"), aided by the other Respondents, fraudulently obtained rate increases from their state public service commissions ("the Public Service Commissions") and the Federal Energy Regulatory Commission ("FERC") through improper accounting for spare parts. Suing on behalf of all ratepayers of each utility, Petitioners seek treble damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") — and other damages for other claims, such as under the Federal Power Act, the antitrust statutes, 42 U.S.C. § 1983, and common law fraud — all based on the amount by which they allege each utility's rates were inflated as a result of these accounting practices. Because of the filed rate doctrine, *inter alia*, the district courts dismissed these actions for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

On appeal, the two cases were consolidated and a panel of the Eleventh Circuit, in a split decision, reversed. *Taffet v. The Southern Co.*, 930 F.2d 847 (11th Cir. 1991). Upon Respondents' petitions for rehearing *en banc*, the Eleventh Circuit vacated the

panel opinion and granted rehearing *en banc*. *Taffet v. The Southern Co.*, 958 F.2d 1514 (11th Cir. 1992) (*en banc*). Subsequently, the *en banc* court unanimously affirmed the decisions of the district courts. *Taffet v. The Southern Co.*, 967 F.2d 1483 (11th Cir. 1992) (*en banc*). In an opinion authored by Chief Judge Tjoflat, the Court correctly determined that Petitioners' claims were barred by the filed rate doctrine because the regulatory schemes enacted by Congress, Alabama and Georgia vested the exclusive authority to establish utility rates in FERC and the state Public Service Commissions.

> The [Petitioners] in the instant cases paid utility rates established by [FERC and] the [state Public Service Commissions]. They had no legal right to pay any other rate. Since "[i]njury implies violation of a legal right," *Keogh*, 260 U.S. at 163, 43 S. Ct. at 49, the [Petitioners] suffered no legally cognizable injury by virtue of paying the filed rate. Thus, the [Petitioners] have failed to state a claim upon which relief can be granted under RICO.[3]

The Court considered and rejected Petitioners contention that RICO established an exception to the well-founded and long-standing filed rate doctrine.

B. Factual Allegations

These cases were decided on Respondents' motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Consequently, there is no factual record. The *en banc* opinion contains a succinct statement of Petitioners' allegations. Although for purposes of the motions to dismiss and for present purposes the factual allegations of Petitioners' Complaints must be taken as true, Respondents steadfastly deny that they have engaged in any fraudulent, illegal, or improper conduct.

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[3] *Taffet*, 967 F.2d at 1494.

REASONS FOR DENYING THE WRIT

Petitioners have failed to present any "special or important reasons" for the grant of certiorari and have failed to invoke any of the criteria specified in Supreme Court Rule 10.1: there is no conflict with a decision of another federal court of appeals; there is no departure "from the accepted and usual course of judicial proceedings;" and there is no conflict "with applicable decisions of this Court."

As this Court has uniformly held and as the Petitioners have acknowledged, the "filed rate doctrine" is of long-standing and precludes courts "from imposing a rate different from the rate filed with the regulatory agency" empowered to set such rates. Petition, at 7; *see, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156 (1922). This doctrine serves the dual purposes of preserving the regulatory agency's authority to set reasonable rates and ensuring that rates remain uniform and nondiscriminatory. *See, e.g., Arkansas Louisiana Gas*, 453 U.S. at 577-78. The filed rate doctrine establishes that the rate set by or filed with the proper regulatory agency is the only legal rate until changed by the agency, "and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities*, 341 U.S. at 251.

This Court has disposed of every attempt to override or circumvent the filed rate doctrine. *See, e.g., Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ___; 110 S. Ct. 2759 (1990) (breach of contract); *Square D*, 476 U.S. at 424 (antitrust); *Arkansas Louisiana Gas*, 453 U.S. at 584 (breach of contract); *Montana-Dakota Utilities*, 341 U.S. at 251-52 (claim for fraud under the Federal Power Act); *Keogh*, 260 U.S. at 163 (antitrust). In each instance, such claims were found to have amounted to no more than demands for rate relief, which are proscribed by the filed rate doctrine.

The filed rate doctrine is based upon the recognition that rate-setting is a complex, specialized, and discretionary task properly left to the regulatory bodies that have been legislatively established and given exclusive authority to fulfill this function. *See, e.g., Montana-Dakota Utilities*, 341 U.S. at 251-52. Its wisdom has resulted in its having "been extended across the spectrum of regulated utilities." *Arkansas Louisiana Gas*, 453 U.S. at 577-78. The doctrine embodies a related justiciability concern: that rate-setting is of a legislative nature and transgresses the proper authority conferred upon federal courts by Article III of the Constitution. *See, e.g., Montana-Dakota Utilities*, 341 U.S. at 251-52; *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 444 (1923). Thus, courts are barred from awarding to ratepayers damages measured by the difference between the filed rate and the rate which might have been set absent some alleged wrongdoing.

Petitioners make it clear that they seek damages falling squarely within the prohibition of the filed rate doctrine.

> The Ratepayers seek recovery of their money paid to the utilities as a result of the fraudulently obtained rate increases.

Petition, at 2; *see also Taffet*, 967 F.2d at 1487 (*en banc*) (petitioners have alleged injury "in the form of excessive and illegal charges paid for electrical utility service."). The Eleventh Circuit *en banc* correctly applied the ample precedent of this Court in holding that Petitioners enjoyed no right to utility rates other than those they had paid and that they had, therefore, suffered no legally cognizable "injury to business or property" by paying the lawful rate.[4] *Taffet*, 967 F.2d at 1494 (*en banc*).

This holding accords with this Court's explanation in *Square D* of its earlier *Keogh* decision upon which it relied.

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[4] In reaching its holding, the Eleventh Circuit carefully considered and rejected every argument now raised by Petitioners before this Court.

The Court reasoned that the ICC's approval had, in effect, established the lawfulness of the defendant's rates, and that the legal right of the shippers against the carrier had to be measured by the published tariff. It therefore concluded that the shipper could not have been "injured in his business or property" within the meaning of § 7 of the Sherman Act by paying the carrier the rate that had been approved by the ICC. Justice Brandeis explained:

> "Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. *The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.*"

Square D, 476 U.S. at 416-17 (emphasis added; citations and footnotes omitted).

Nevertheless, Petitioners seek to circumvent the dictates of the filed rate doctrine and its underlying policies by asking the courts to fashion a RICO or fraud exception to this doctrine. The Eleventh Circuit expressly considered and correctly rejected this request.

> A regulated entity's alleged fraud does not create a right to a reasonable rate that exists independently of agency action. Thus, even if the filed rate is obtained through fraud, it remains true that one does not suffer the predicate "injury to business or property" by paying the filed rate.

Taffet, 967 F.2d at 1495 (*en banc*). The Court recognized that the determining factor for applying the doctrine was the impact

upon the regulatory scheme that would be caused by a damages award, not the nature of the alleged misconduct. *Id.* This holding accords with the only other circuit decision to have considered this issue, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2306 (1992), as well as with the precedent established by this Court.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE PRESENTED BY THIS CASE.

Petitioners labor to fabricate a conflict among the federal circuits. Their efforts are disingenuous, at best, and unavailing. The undeniable state of the law is that no circuit decision holds that violations of RICO or allegations of fraud provide an exception to the filed rate doctrine; and there is no circuit decision contrary to the *en banc* decision in this case.[5]

The only other circuit to have decided this issue is in accord with the Eleventh Circuit in rejecting such a contention. *H.J.*, 954 F.2d at 492. There, telephone ratepayers alleged that Northwestern Bell had bribed members of the Minnesota Public Utilities Commission and thereby improperly obtained excessive rate increases. The plaintiffs sought damages under RICO for the excessive rates. In that case, too, the plaintiffs argued that allegations of fraudulent conduct and violations of RICO warranted an exception to the filed rate doctrine. The Eighth Circuit, as the Eleventh Circuit, declined to break with established precedent and create such an exception.

> We are convinced, however, that the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's

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[5] Remarkably, Petitioners even appear to cite the divided panel decision in *Taffet* as evidence of a split of authority in the circuits. Petition, at 9. However, this opinion retains no precedential value as the Eleventh Circuit, sitting *en banc*, vacated that decision, 958 F.2d at 1514, and unanimously affirmed the district courts' dismissals. 967 F.2d at 1495.

> decision will have on agency procedures and rate determinations.

H.J., 954 F.2d at 489. Consequently, the Eighth Circuit affirmed the dismissal of the ratepayers' RICO action, *id.* at 494, and this Court denied certiorari. ___ U.S. ___, 112 S. Ct. 2306 (1992).

No other circuits have decided this issue and, therefore, Petitioners cannot cite any decision which conflicts with *Taffet* and *H.J.* Petitioners go to great lengths to fashion their perceived conflict, but the decisions they cite are simply inapposite. For example, Petitioners state that in *dicta* the D.C. Circuit recognized a fraud exception to the filed rate doctrine in *Southern Union Co. v. FERC*, 857 F.2d 812, 818 (D.C. Cir. 1988), *cert. denied*, ___U.S.___, 110 S. Ct. 1118 (1990). In fact, the court in *Southern Union* upheld and applied the filed rate doctrine to bar the recovery of a state court damages award. The conduct sued upon did not amount to fraud; therefore, the court had no cause to, and did not, decide whether it would recognize a fraud exception to the filed rate doctrine. *Id.* at 819. However, contrary to the claim of Petitioners, the court's *dicta* did not "recognize[] an exception to the filed rate doctrine in cases of fraudulent conduct." Petition, at 9 n.7. The court merely noted that the majority opinion in *Arkansas Louisiana Gas*, 453 U.S. at 583 and n.13, suggested that it would require egregious conduct to "*consider* making an equitable exception to its ruling." *Southern Union*, 857 F.2d at 818 (emphasis added).

The remaining decisions cited by Petitioners do not even involve the filed rate doctrine. Petitioners, for instance, proffer *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990) ("*LILCO*"), as evidence of a supposed conflict. But, as Petitioners are forced to acknowledge, this decision gave no consideration to the applicability of the filed rate doctrine, let alone recognized a fraud exception to that doctrine. Petition, at 9 ("The Second Circuit . . . was silent as to the filed rate doctrine."). Instead, the focus of the *LILCO* decision was whether public utilities are generally subject to civil RICO actions or whether "there is a public utility exception to RICO's general

applicability," 907 F.2d at 1305, which has never been an issue in the instant action.

Petitioners' reliance upon *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, *modified*, 690 F.2d 1240 (9th Cir. 1982), and *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), is similarly misplaced. Neither case presented a claim for damages which would have required the court to re-determine the reasonableness of a rate fixed by a regulatory body, and, therefore, neither case involved the filed rate doctrine. Rather, both of these cases concerned an entirely different issue, *viz.*, whether regulated companies which engage in anti-competitive conduct are immune from antitrust liability. The court in *Clipper Exxpress* expressly declined to apply the filed rate doctrine announced by this Court in *Keogh*, because the issue in *Clipper Exxpress* did not present "a question of a challenge to the legality of a rate approved by the ICC." *Clipper Exxpress*, 690 F.2d at 1267. And even the vacated panel decision in this case recognized that the court in *Woods Exploration* did not consider the applicability of the filed rate doctrine. *Taffet*, 930 F.2d at 856 ("[B]ecause the *Woods* court did not specifically consider the filed rate doctrine, its precedential value on the filed rate issue is questionable."). Thus, Petitioners have failed to cite a single circuit decision which even hints at — let alone establishes — a RICO or fraud exception to the filed rate doctrine or a circuit decision which conflicts with the holdings in *Taffet* and *H.J.*[6]

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[6] Petitioners are thus incorrect and misleading when they state that the "Second, Fifth, and Ninth Circuits, (and D.C. Circuit, in dicta) have held that the filed rate doctrine is not a bar to a claim resulting from fraud upon an agency." Petition, at 11.

II. THIS CASE DOES NOT CONFLICT WITH ANY PRECEDENT ESTABLISHED BY THIS COURT.

Petitioners assert that "the Supreme Court has never applied the [filed rate] doctrine when faced with a claim that a fraud has been committed upon the agency itself" and thereby summarily dismiss the entire filed rate jurisprudence of this Court. Petition, at 12. Relying upon decisions which do not implicate the filed rate doctrine and are in no way apposite to the question presented, Petitioners proceed to argue that the *Taffet en banc* decision conflicts with the precedent of this Court because "the Supreme Court has many times refused to protect agency decisions tainted with fraud." *Id.* Petitioners thus ignore the foundations of the doctrine, its essence, and the controlling precedent established by such cases as *Montana-Dakota Utilities*, *Keogh* and *Square D*.

Ratemaking has long been recognized to be a legislative function. *See, e.g., Terminal R.R. Ass'n of St. Louis v. United States*, 266 U.S. 17, 30 (1924). The filed rate doctrine was first promulgated for the express purpose of prohibiting judicial intrusion into the legislative domain of ratemaking. *See, e.g., Arkansas Louisiana Gas*, 453 U.S. at 577-78 ("The considerations underlying the [filed rate] doctrine . . . are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."). The doctrine recognizes that Article III courts do not have the authority to engage in such legislative activity. *Montana-Dakota Utilities*, 341 U.S. at 251; *Keller,* 261 U.S. at 444. Consequently, it is the nature of the relief sought and whether such relief would involve the court in ratemaking — not the theory of recovery or

the nature of the alleged wrongdoing — that determines the applicability of the filed rate doctrine.[7]

The relief sought by Petitioners would necessarily involve the courts in the sort of retroactive ratemaking which the doctrine precludes and would undermine the legislative ratemaking schemes which the doctrine was expressly designed to protect. Therefore, the Eleventh Circuit rightly affirmed the dismissal of each of Petitioners' claims in accordance with the precedent of this Court.

Furthermore, as the Eleventh Circuit *en banc* recognized, "[a] regulated entity's alleged fraud does not create a right to a reasonable rate that exists independently of agency action." *Taffet*, 967 F.2d at 1494-95. This Court consistently has held that a ratepayer "can claim no rate as a legal right that is other than the filed rate . . . and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities*, 341 U.S. at 251. Because the filed rate is the only lawful rate, ratepayers can claim no cognizable injury by paying the filed rate, regardless of the nature of their allegations. Thus, for instance, in the context of a civil action for alleged antitrust violations, this Court has held that a ratepayer cannot show the requisite injury to business or property when the ratepayer has paid the filed rate. *Square D*, 476 U.S. at 416; *Keogh*, 260 U.S. at 163.

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[7] For this reason, the Eleventh Circuit *en banc* correctly affirmed the district courts' dismissals of all of Petitioners' claims. Regardless of the stated theory of recovery, each of Petitioners claims alleged one and the same injury — excessive utility rates — and sought one and the same form of relief — the recovery of an amount equal to the difference between the rates as approved by FERC and the state Public Service Commissions and the rates that might have been approved but for the alleged fraudulent accounting practices. *See, e.g., Square D*, 476 U.S. at 424 (antitrust claim barred by filed rate doctrine); *Montana-Dakota Utilities*, 341 U.S. at 255 (claim under Federal Power Act barred by filed rate doctrine); *Arkansas Louisiana Gas*, 453 U.S. at 584-85 (state law claim barred by filed rate doctrine).

Like Petitioners in this case, the plaintiffs in *Square D* alleged affirmative misconduct by regulated companies in connection with the ratemaking process — misconduct no less egregious than that alleged by Petitioners here. The plaintiffs alleged that the defendants engaged in a conspiracy to fix rates and eliminate competitors. *Square D*, 476 U.S. at 412. Nevertheless, this Court upheld the continued application of the filed rate doctrine despite allegations — which the Court took as true — that the rates at issue were the result of *covert illegal* acts and amounted to "blatant antitrust violations." *Id.* at 414, 417 n.19.

Similarly, as Petitioners admit, Petition, at 12, this Court has applied the filed rate doctrine to bar a claim against one party which had allegedly defrauded another party and thereby obtained alleged excessive utility rates. *Montana-Dakota Utilities*, 341 U.S. 246. In *Montana-Dakota Utilities*, the plaintiff alleged that, through a "fraudulent abuse" of interlocking corporate directorates, the defendant had led the Federal Power Commission to approve electric rates which were unreasonably high. *Id.* at 248. Like Petitioners in this case, the plaintiff in *Montana-Dakota Utilities* conceded that it had been charged in accordance with the filed rate schedules. On the basis of the filed rate doctrine, this Court held that the complaint should have been dismissed because the courts could not adjudicate the issues raised by the plaintiff. *Id.* at 251-52.

Petitioners erroneously contend that *Montana-Dakota Utilities* is distinguishable from the case at bar because it did not involve a fraud upon the regulatory agency. Petition, at 12. This contention is without merit. Whether the alleged fraud is directed toward the regulatory agency itself or some other participant in the ratemaking process, the result is the same — the purported payment of an unreasonable rate. Therefore, if this Court did not find the covert, illegal antitrust activities in *Square D* or the fraudulent abuse of directorates in *Montana-Dakota Utilities* sufficient to justify a departure from the dictates of the filed rate doctrine, there is no basis for rejecting the doctrine in this case.

In addition, this Court has repeatedly confirmed that the RICO civil damages provision is modeled upon the antitrust statutes. *See, e.g., Holmes v. Securities Investor Protection Corp.*, ___ U.S. ___, 112 S. Ct. 1311, 1317 (1992); *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150-52 (1987). This Court has held that, in determining the meaning of § 1964(c) of RICO, the meaning given by courts to its antitrust prototype is controlling.

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act and later in the Clayton Act's § 4. *It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.*

Holmes, ___ U.S. at ___, 112 S. Ct. at 1318 (emphasis added; citations omitted). In *Keogh* and *Square D*, this Court applied the filed rate doctrine and determined that ratepayers, who alleged payment of excessive rates due to the defendants' antitrust violations, had not been "injured in [their] business or property." Thus, because they had paid the filed rate, they had not suffered the injury required by section 4 of the Clayton Act. This precise language is employed in section 1964(c) of RICO, and it must be construed to have the same meaning as that rendered by this Court in *Keogh* and *Square D. Holmes*, ___U.S. at ___, 112 S. Ct. at 1318.[8] Under such a construction, Petitioners' do not have a

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[8] Petitioners argue that RICO is to be given a liberal construction and that this demands a different result. Petition, at 13-14. This argument ignores the fact that the antitrust laws upon which RICO is modeled are also accorded an "expansive remedial" construction. *Blue Shield of Virginia v. McCready*, 457 U.S. 470, 472-73 (1982). Moreover, despite Petitioners' suggestion, a liberal statutory construction cannot create a property right where one does not otherwise exist.

valid RICO claim because they paid the filed rate, and, therefore, like the plaintiffs in *Keogh* and *Square D,* they have suffered no injury to their business or property.[9]

Finally, Petitioners argue that the *Taffet* decision conflicts with precedent because it established an improper standard of proof by stating that "a RICO plaintiff, to recover, must show that the defendant is criminally liable under section 1962." Petition, at 15-16; *Taffet,* 967 F.2d at 1487 (*en banc*). This contention is as unconvincing as it is irrelevant. Since the cases at bar were decided upon the pleadings, the standard of proof which would have been required of Petitioners at trial is irrelevant. The standard of proof under RICO was not in issue before the Eleventh Circuit, nor is it an issue properly before this Court. Even Petitioners note that the Court's *dicta* was "gratuitous." Petition, at 16. Moreover, taken in its proper context, the *dicta* reveals that the Eleventh Circuit was not speaking to any particular standard of proof but merely noting that a RICO plaintiff must show, in addition to an injury to business or property, that the defendant's conduct violated one or more of the prohibitions set forth in 18 U.S.C. § 1962.

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[9] The foregoing arguments equally dispense with Petitioners' curious contention that the *Taffet en banc* decision somehow violates the Supremacy Clause. Petition, at 15. The filed rate doctrine and the corollary principle that ratepayers have no right to a rate other than the filed rate — not state law — preclude the retroactive ratemaking relief Petitioners seek under RICO. Moreover, this Court has previously applied the filed rate doctrine to protect state regulatory schemes without running afoul of the Supremacy Clause. *See Louisville & Nashville R.R. v. Garrett,* 231 U.S. 298 (1913).

CONCLUSION

Because the Eleventh Circuit's unanimous *en banc* decision in this case comports with the only other circuit decision to have decided the question presented and with the filed rate doctrine established by this Court, Petitioners have failed to advance any reason for the grant of certiorari. Their Petition should be DENIED.

This 12th day of November, 1992.

Respectfully submitted,

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